Jennie-O Foods, Inc. *and* United Food and Commercial Workers International Union, Local 653, AFL–CIO, CLC, and General Drivers, Helpers & Inside Employees, Local 487, a/w I.B.T.C.W. & H. of A., AFL–CIO.[1] Cases 18–CA–10535, 18–CA–10662–1, and 18–RC–14327

January 25, 1991

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND OVIATT

On March 28, 1990, Administrative Law Judge Robert W. Leiner issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief. The Charging Parties filed cross-exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] and to adopt the recommended Order as modified.[4]

The Respondent excepts, citing *Nickles Bakery of Indiana*, 296 NLRB 927 (1989), to the judge's failure to find that certain complaint allegations should be dismissed, as they were not fairly encompassed within the charges. The judge, in an unpublished Order, found the Respondent's claim without merit, noting the Board's favorable citation in *Nickles* to *NLRB v. Braswell Motor Freight Lines*, 486 F.2d 743 (7th Cir. 1973). In *Nickles*, the Board observed that the court found a sufficient relation between the charge and complaint in circumstances involving acts that are all ''part of an overall plan to resist organization.''

The Respondent's exceptions argue that at the very least the charge must allege the existence of an overall plan to resist unionization. We disagree. Neither the Board in *Nickles* nor the *Braswell* court require that the charge allege an overall plan to resist unionization. In any event, the charge in fact does allege such a plan because it states that the Respondent has polluted the atmosphere for a fair election.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Jennie-O Foods, Inc., Willmar, Minnesota, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(b).

''(b) Remove from the Respondent's personnel records any reference to the unlawful suspension of Susan Sander, and any warnings, both oral and written, issued to Susan Sander, Tina Noyes, and Sarah Farkas from April through August 1988, for violation of the Respondent's ''no instruction'' rule or ''no talking'' rule and notify each of them, in writing(that this has been done, and that evidence thereof will not be used against them in any way.''

2. Substitute the attached notice for that of the administrative law judge.

IT IS FURTHER ORDERED that the election in Case 18–RC–14327 is set aside, and that the case is severed and remanded to the Regional Director for Region 18 to conduct a second election whenever he deems it appropriate.

[Direction of Second Election omitted from publication.]

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union

[1] On November 1, 1987, the Teamsters International Union was readmitted to the AFL–CIO. Accordingly, the caption has been amended to reflect that change.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In sec. D,15, par. 5, the judge found that a threat violated Sec. 8(a)(1) and (3) as alleged. The General Counsel did not allege that the threat violated Sec. 8(a)(3). We adopt only the 8(a)(1) finding.

The correct citation for *NLRB v. Advertisers Mfg. Co.*, is 823 F.2d 1086 (7th Cir. 1987).

[3] The Respondent excepts to the judge's failure to rule on its motion to dismiss certain paragraphs of the complaint. The Respondent claims that the Regional Director improperly added the paragraphs. We find that the Regional Director acted within his discretion, and we therefore find that the Respondent's exception is without merit.

Chairman Stephens finds it unnecessary to pass on the judge's finding that Supervisor Leuze's statement to employee Christianson constituted an unlawful threat of discharge, because other findings of the judge, which we are adopting, support the portion of the Order relating to the discharge threats.

Unlike the judge and his colleagues, Member Oviatt does not agree that the Respondent, through its Plant Manager Schmitz, created an impression of surveillance by stating to employee Birch that ''I understand that you are getting into politics too.'' Birch responded that ''Yeah, I've always been a Democrat.'' Birch had in fact been elected as an alternate to a union negotiating committee. In Member Oviatt's view, the brief and ambiguous exchange between Schmitz and Birch was insufficient to establish that the Respondent created an impression that it was surveilling its employees' union activities.

[4] We shall modify par. 2(b) of the judge's recommended Order to conform with his findings.

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT suspend, disparately discipline, impose stricter discipline on, issue warnings to, or segregate our employees because they evince sympathy for, membership in, or engage in activities on behalf of United Food and Commercial Workers International Union, Local 653, AFL–CI0, CLC and General Drivers, Helpers & Inside Employees, Local 487, a/w I.B.T.C.W. & H. OF A., AFL–CIO, or either of them, or any other labor organization, or because any such employee engaged in concerted activities protected by Section 7 of the Act.

WE WILL NOT threaten to discharge, not to rehire, to transfer to other jobs, to close the plant and not bargain, or any other reprisals or retaliation against our employees because they support the above-named labor organizations, or any other labor organization, or because they engaged in activities protected by Section 7 of the National Labor Relations Act.

WE WILL NOT prevent the display and use of union insignia in the nonwork areas in the plant in the absence of such devices interfering with production, safety, discipline, or health requirements.

WE WILL NOT attempt to segregate employees, challenge employees to fight, call employees ''traitor,'' destroy union literature, or take any other reprisal against employees because they support or are members of the above-named labor organizations or any other union, or because they engage in activities protected by Section 7 of the National Labor Relations Act.

WE WILL NOT create the impression of surveillance of our employees' activities on behalf of the above-named labor organizations, or either of them, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL make whole Susan Sander for any loss of earnings she may have suffered because of our suspension of her on August 5, 1988, together with interest.

WE WILL remove from our personnel records any and all references to the suspension of Susan Sander, and any and all references to Sarah Farkas, Tina Noyes, and Susan Sander being issued oral or written warnings because of their violation of our ''no talking'' or our ''no instruction'' rule, and WE WILL notify each of them, in writing, that this has been done, and that evidence thereof will not be used against them in any way.

JENNIE-O FOODS, INC.

Florence I. Brammer and *A. Marie Simpson, Esqs*., for the General Counsel.

David R. Hols, Esq. and *Charles F. Bisanz, Esq. (Felhaber, Larson, Fenlon & Vogt)*, of Minneapolis, Minnesota, for the Employer/Respondent.

Mark Lauritsen, Organizer, for United Food & Commercial Workers Union, Local 653, Mason City, Iowa. *Roger Jennings*, Organizer, for General Drivers Local 487, I.B.T., Edina, Minnesota.

DECISION

STATEMENT OF THE CASE

ROBERT W. LEINER, Administrative Law Judge. This matter was heard on six occasions on and between June 27 and August 8, 1989, in Willmar, Minnesota, upon the issues raised by General Counsel's May 9, 1989 consolidated complaint; the Acting Regional Director's (Region 18) report on objections (October 6, 1988), and supplemental report on objections (May 9, 1989). The allegations of the complaint, and the reports on objections in substance, allege Respondent's violation of Section 8(a)(1) and (3) of the Act and its engaging in conduct sufficiently objectionable to set aside the Board-conducted election in the above-captioned representation case. The complaint allegations of violation of Section 8(a)(1) and (3), except in certain cases, parallel the objectionable conduct found in the report and supplemental report on objections.

Respondent's timely filed answer admits certain allegations of the consolidated complaint, denies others and denies commission of any unfair labor practice. It similarly denies engaging in conduct sufficient to set aside the election.

At the hearing, all parties were represented by counsel or otherwise appeared separately on the record, were given full opportunity to call and examine witnesses, submit oral and written evidence, and to argue on the record. At the close of the hearing, counsel and the parties waived final argument and reserved the right to submit posthearing briefs. Posthearing briefs were submitted by the General Counsel, Respondent, and by the Joint Petitioner (Local 653, UFCW and Teamsters Local 487).[1]

[1] Certain allegations (pars. 5(q) and 5(t)) of the complaint were dismissed on Respondent's motion at the close of General Counsel's case. General Counsel withdrew par. 5(cc). In addition, of the two election objections, independent of unfair labor practices, filed by the Joint Petitioners here, one was withdrawn, leaving for disposition only one of the independent objections to the election: whether Respondent's employee Connie Stahnke was a supervisor at the time she served as Respondent's observer in the above-captioned election, thus constituting objectionable conduct sufficient to set aside the election. As hereafter noted, I find it unnecessary to decide this issue.

In addition, General Counsel's motion to correct the transcript, to which Respondent has no objection, is granted.

On the entire record,[2] including the briefs, and from my particular observation of the demeanor of the witnesses as they testified, I make the following

FINDINGS OF FACT

I. RESPONDENT AS STATUTORY EMPLOYER

Respondent concedes, and I find, that at all material times, Respondent, a Minnesota corporation, with principal office and place of business in Willmar, Minnesota, has been engaged in the processing and distribution of poultry products. During the year ending December 31, 1988, Respondent, in the course and conduct of its business operations, sold and shipped from its Willmar facility products, goods, and materials valued in excess of $50,000 directly to points outside the State of Minnesota; and, in the same period, purchased and received at Willmar products, goods, and materials valued in excess of $50,000 directly from points outside the State of Minnesota. Respondent, at all material times, has been and is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE UNIONS AS STATUTORY LABOR ORGANIZATIONS

There is no dispute, and I find that at all material times United Food and Commercial Workers Union, Local 653, AFL–CIO, CLC, and General Drivers, Helpers & Inside Employees, Local 487, a/w I.B.T.C.W. & H. of America are, and each of them is, a labor organization within the meaning of Section 2(5) of the Act.[3]

[2] The petition for certification in Case 18–RC–14327 was filed on April 14, 1988, with a first amended petition filed on April 26, 1988. The Stipulated Election Agreement was approved on May 3, 1988.

The charge in Case 18–CA–10535 was filed and served on June 20, 1988, with a first amended charge on August 29, 1988. Meanwhile, the Board-conducted election was held on June 24, 1988, and a certification on conduct of the election issued on the same day.

On October 6, 1988, both a complaint and notice of hearing in Case 18–CA–10535 were issued and served together with the Regional Director's report on objections, an order consolidating cases and notice of hearing in Case 18–RC–14327. The order also approved withdrawal of objections and certification of results in another election in Case 18–RC–14342.

The charge in Case 18–CA–10662–1 was filed and served on October 26, 1988, with a first amended charge filed on October 31, 1988, and served on November 1, 1988. The second amended charge in that case was filed and served on November 10, 1988, with a third amended charge filed and served on December 1, 1988.

On May 9, 1989, there were issued and served an order consolidating cases (Cases 18–CA–10535 and 18–CA–10662–1) together with a notice of hearing, a supplemental report on objections, and a further order consolidating the above cases. On May 19, 1989, Respondent served its answer to the amended complaint.

At the opening of the hearing, General Counsel made substantial amendments to the consolidated complaint (G.C. Exh. 2) to which Respondent made appropriate answer.

[3] Respondent also admits that the following named persons are its supervisors and agents within the meaning of Sec. 2(11) and (13) of the Act: Martin Bembers, Allen Schmitz, John Jeffords, Daniel Nelson, Richard Van Ort, Gale Rosen, Randy Travis, Randy Callander, Gerard Schreiner, Chuck Vilven, Dave Lyon, Les Goff, Rich Noyes, and Jan Leuze.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Respondent operates two poultry processing plants in Willmar, Minnesota, plants 1[4] and 4. Only plant 4 is involved in this proceeding.

In the afternoon of October 13, 1987, United Food and Commercial Workers commenced 2 hours of handbilling at plant 4, in the parking lot driveway, as the first-shift employees were leaving at about 3 p.m. There were only two handbillers: Mark Lauritsen, a UFCW organizer, and Sarah Farkas, a plant 4 quality control department employee. The quality control department had seven employees, a supervisor (Gale Rosen) and an assistant supervisor (Arvid Torkelson). In the 8-month period between this first October 13, 1987 handbilling and the June 24, 1988 election, Farkas handbilled perhaps a dozen times; but until April 1988, she was the only employee engaged in handbilling. In October, she was the only quality control employee actively supporting the Union (Tr. 276).

At the October 13 handbilling, in the driveway, the first person she spoke to was her own quality control supervisor, Gale Rosen. As he drove from the plant, he rolled down his window and said ''I let you out early so you could do this?'' referring to the handbilling. Farkas told him: ''No, you let me out early because my lines were done'' (Tr. 59). It was not unusual for Farkas to leave the plant before her 3 p.m. quitting time if her work was done.

After her conversation with Supervisor Rosen, Martin Bembers,[5] Respondent's research and development director (also director of quality control) drove by. Farkas offered Bembers a handbill which he refused. He told her that she was blocking traffic and might cause an accident. On the other hand, when Chairman of the Board Earl Olson drove by and accepted a handbill, he told Farkas that she looked familiar and asked her where she worked. When she said merely ''in the plant,'' he asked her in which department or area in the plant she worked. She told him it was in the quality control department (Tr. 60). Plant Manager Schmitz saw

[4] The Unions sought to represent employees in plant 1, and filed a petition for such representation in Case 18–RC–14342. Following an election (held on a Stipulated Election Agreement), the tally of ballots showed that, of 233 eligible voters, 78 had cast votes for the Union and 129 against. Thereafter, on October 6, 1988, the Regional Director for Region 18 approved the Unions' request to withdraw their objections to that election in plant 1. On October 6, 1988, the Regional Director certified the results.

[5] Martin Bembers, supervisor over Supervisor Rosen, was responsible for quality control at both plants in Willmar (Tr. 1145). In charge of quality control since 1982, Bembers, at all material times, reported to John Jeffords, vice president of production. Both Jeffords' and Bembers' offices were not in the production area of the plant itself. Rather, Jeffords, Bembers, and Chairman of the Board Olson were in the corporate office area which was separated by about 60 feet and intermittent doorways from the quality control office where Gale Rosen was the supervisor (Tr. 788–789). It was not common for supervisors, like Gale Rosen, to enter the corporate office area (Tr. 789). Bembers, as chief of quality control, did not report to the plant manager (Tr. 786). In terms of the supervisory hierarchy in plant 4, Bembers was on the same level as the plant manager (Schmitz).

her handbilling and Vice President John Jeffords took a handbill from her (Tr. 61).[6]

Six days later, on October 19, 1987, Production Vice President Jeffords called a meeting only of the seven quality control employees. Quality Control Supervisors Rosen and Torkelson, and 15 supervisors from all departments, were also present (Tr. 83–85). Jeffords read to the employees and at least 17 supervisors a policy and procedure statement forbidding quality control employees to ''instruct'' the production (''line'') employees (Tr. 83);[7] said that he expected employee cooperation; but no copies of the statement were distributed (Tr. 84). At the end of the meeting, the quality control employees asked Supervisors Bembers and Rosen what the restrictions meant and Martin Bembers said: ''It means no talking'' (Tr. 85). The employees asked Bembers for a copy but he did not provide them with a copy. He did give them a list of designated people that the quality control employees were permitted to talk to (Tr. 86). Rosen thereafter secured a copy of the statement and the employees read it. Assistant Supervisor Torkelson told the quality control employees that the key words in the new policy were ''not to instruct'' (Tr. 88).

Plant Manager Alan Schmitz testified that the ''no instructing'' rule had always been in existence but enforcement had grown lax because of the excellence of the quality control employees (Tr. 835); but two incidents (resulting in costly mislabeling), within a couple of days of each other, just prior to Vice President Jeffords' reading of the rule (Tr. 836), caused Respondent to tighten up its policy. Jeffords said the incidents occurred less than 1 week before October 19 (Tr. 986). On the basis of the record considered as a whole, and notwithstanding that these incidents may have occurred—and occurred just prior to October 19 (October 13 was the date of the first handbilling)—I do not find that the alleged incidents were the genuine cause for Respondent's tightening of the rule preventing quality control employees from issuing ''improper instructions'' to production employees. Quality Control Supervisor Rosen was working in the plant in October 1987 and never heard of incidents of his quality control employees issuing erroneous instructions to production employees (Tr. 1369–1370). Schmitz never saw the incidents, they were reported to him (Tr. 836). There is no direct evidence of anyone observing the incidents or the identity of who reported these events to Schmitz. Jeffords mentions only one incident (Tr. 986). As will be seen, Respondent did not want the quality control employees to ''talk'' to line employees, much less to ''socialize'' with them.

Later in the afternoon of October 19, 1987, Supervisor Rosen called a further meeting of the quality control department employees to discuss the new policy. The only other supervisor present was Torkelson. At this meeting, while Rosen said that the key words were ''not to instruct'' production employees, he also told them that they should not ''socialize'' with line employees. At first, Rosen said that they could not even say ''hello'' to line employees but then he changed that and said that it was permitted to say ''hello'' (Tr. 90).

Prior to this time, the quality control employees had never been told that they could not socialize, talk to, or ''instruct'' line employees.[8]

At this meeting, Farkas asked Rosen why the new rule had been placed in effect. Rosen answered: ''I don't know what you're leading me into. No matter what I say I'll be hanging myself. And besides, we all know why it came about'' (Tr. 93–94).

In mid-November 1987, Rosen called a meeting of quality control employees and told them that they could no longer take their workbreaks together. Prior to that time, the quality control employees could take their breaks together (Tr. 95).

In a January 1988 meeting of quality control employees, Rosen told them that it had been reported that quality control employees had spoken to each other for as long as 2 hours. Farkas admitted this but said that Rosen had given her permission to do that (Tr. 99). Rosen, not called as a witness by Respondent, did not deny this in reply. Prior to this time, there was no known Respondent restriction on quality control employees talking to each other.

Martin Bembers testified that although the matter had never been reduced to writing, quality control employees had been told many times that they were not to instruct employees. If they had a quality control problem they were to seek out only the concerned supervisors (Tr. 1226). That had been the rule for years, at least 1982–1987. A different problem was quality control employees *talking* to employees on the line. Bembers testified that talking became a problem only prior to the election (Tr. 1226–1227); that while quality control employees talking to and visiting line employees amounts to the same thing that is different from, and is not forbidden under, the rule against quality control employees ''instructing other people how to correct problems'' (Tr. 1227–1228). The problem of ''instructing'' was recognized

[6] Respondent concedes that it knew of the Union's organizational efforts among its employees by about October 15, 1987, because of a newspaper article which had appeared and with which Respondent was familiar (Tr. 40). I find that it had such knowledge 2 days earlier, October 13.

[7] Jeffords apparently read from a memorandum (G.C. Exh. 3) which, in pertinent part, states:

> 1. It shall be the policy and Practice that Quality Assurance Personnel shall not be allowed to instruct Production employees. It shall be the Policy and Practice that either Supervisor, Assistant Supervisor, or the designated person shall be stationed within the department from start up until the end of of the shift. The reasons being:
>
> (a) Due to the nature and scope of QA Personnel being responsible for the application and enforcement of rules and regulations concerning plants sanitation and quality of finished product. Management and supervisory Plant Personnel share these responsibilities.
>
> (b) Production Employees cannot be held responsible for nor do they have authority to make decisions necessary in the operations of the Department. This is the direct responsiblity of the Departmental Supervisors and Assistant Supervisors.
>
> 2. To allow continuity in problem solving and proper chain of command effect it is absolutely necessary that QA Personnel communicate only with the responsible departmental supervisor, assistant supervisor, or designated persons seeking direction and solutions to the problem at hand. Should there be difficulty encountered in communicating with these persons, QA Personnel and Production Personnel should communicate immediately with their immediate supervisor.
>
> 3. This should not be construed nor is it intended to change the QA Departmental chain of reportability or the Production organizational structure.

Attached thereto were the names of the ''designated'' employees in the approximately 10 departments (wherein quality assurance personnel performed their jobs) who should be contacted in the absence of supervisors.

[8] General Counsel expressly disavowed alleging the 1987 promulgation of the no-instructing policy to be an unfair labor practice (Tr. 90–91). This evidence was adduced, according to General Counsel, to show that the ''no-instructing'' policy turned into a ''no talking'' policy restricted *only* to quality control employees on the basis of which allegedly unlawful warnings were issued (Tr. 91).

as a problem in October 1987; the problem of talking and visiting became a problem only with the election (Tr. 1228–1229). Nevertheless, Bembers testified that prior to the election, he had spoken with quality control employees Tina Noyes, Sarah Farkas, and Susan Sander, individually, and told them that they were forbidden to *talk* to employees outside their assigned work areas (Tr. 1229–1230). There was no rule, written or unwritten, forbidding talking prior to April 1988.

Regardless of the existence of any rule, quality control employees, prior to October 1987, routinely talked to machine operators concerning problems on the machine operators production lines (Tr. 1231). Reports of quality control employees talking to employees on the line (but not necessarily ''instructing them'') allegedly increased immediately prior to April and May 1988, before the election (Tr. 1232). Bembers told Supervisors Gale Rosen and Arvid Torkelson to keep an eye on the quality control employees for talking in areas in which they were not supposed to be; to make sure it didn't happen (Tr. 1234). Commencing in April or May 1988, the plant manager, Alan Schmitz, came to Bembers with at least five complaints concerning quality control employees not doing their jobs and complaints from line employees (to the plant manager) concerning the activities or behavior of quality control people with regard to line employees (Tr. 1235–1236). No such employee complaints were proved. In none of these complaints by Schmitz to Bembers of quality control employees allegedly interfering with production did Bembers tell him about the existing policy of keeping an eye on quality control employees nor did he ask Schmitz to keep an eye on them nor was there any remedy mentioned (Tr. 1235–1236).

In the period 1982 through April 26, 1988, Bembers, in charge of the quality control department, had never issued a suspension for any quality control employee; never issued a written warning; and never issued a verbal warning (which had been reduced to writing) (Tr. 1239). The memorialization of ''verbal'' warnings was unknown. Prior to April 26, 1988, there had never been a warning of any kind issued to any quality control employee for talking or ''instructing'' notwithstanding that Bembers knew that employees from quality control had talked to line employees in the past (Tr. 1241).

In any event, in late October or early November 1987, quality control employee Tina Noyes had a conversation with Gerard Schreiner, supervisor of the pioneer and roll line (production of turkey rolls) (Tr. 242). The conversation started with how busy the plant was becoming and then turned to the union organizing effort. Schreiner said that Noyes was organizing on behalf of the union at that time but Noyes told them that she was not. Schreiner then told her that the quality control department was the ''leader'' or ''root'' of the union campaign drive (Tr. 242–243). Although supervisor Schreiner was thereafter called by Respondent to testify in this proceeding, he failed to deny this conversation with employee Noyes.

It is not disputed that quality control employees, unlike other employees, do not have a fixed workplace. Peregrination of union sympathizers among production employees would not be in the interest of any employer hostile to union organization.

B. *The Individual Unfair Labor Practices and Objectionable Conduct*

(1) Paragraph 5(a) of the amended consolidated complaint is parallel to a specific objection as described in the October 6, 1988 report on objections.

The allegation of an 8(a)(1) violation is that on or about April 19, 1988, Quality Control Department Supervisor Gale Rosen told employees that their continued union activities could cost him his job and threatened that employees would no longer be dealing with him, but would have to deal with the director of research and development, Martin Bembers.

(2) By paragraph 6(b), General Counsel alleges a violation of Section 8(a)(3) and (1) of the Act, in that on or about May 1988, Respondent appointed Director of Research and Development Martin Bembers to supervise the quality control department.

The facts supporting General Counsel's allegations in complaint paragraphs 5(a) and 6(b) are not in dispute. In particular, Supervisor Gale Rosen was not called to refute the General Counsel's testimony regarding conversations, as hereafter described, between him and his quality control employees, Sarah Farkas and Tina Noyes.[9]

Farkas credibly testified that following her October 13, 1987 handbilling, as above described, union activity, in general, and handbilling, in particular, was at a low ebb until at least February 1988. Employees, other than Farkas, did not join in the handbilling until April 1988 (Tr. 62).

Sometime in mid-April, apparently on or about April 19, 1988, after Farkas had learned that a petition for an election had been filed [the instant petition, Case 18–RC–14327, filed April 14, 1988], Farkas and other employees on the union organizing committee were given handbills for specific distribution to company supervisors (Tr. 63). The handbills apparently contained the ''dos and don'ts'' of lawful supervisory conduct (Tr. 64). Thus, about a half-hour before starting time, between 5:30 and 6 a.m., Farkas gave handbills to at least four supervisors (Tr. 64–65) and proceeded to punch in and go to work.

At about 7 a.m., she received a message that her supervisor, Gale Rosen, wanted to talk to her right away. She went to Rosen's office (his desk is in the quality control kitchen (Tr. 66)) and he asked her into a back conference room. Rosen asked her if she put the handbill on his desk. When Farkas denied doing so, Rosen asked her how else it got there and Farkas said she didn't know. Holding a copy of the handbill in his hand, Rosen told Farkas: ''I take this as a threat.'' Farkas told him that it wasn't intended as a threat but was intended as information (Tr. 67).

During the conversation, quality control employee Tina Noyes entered the room and had heard part of the conversation. When Rosen asked again how the handbill had gotten on his desk, Tina Noyes admitted that she had put it there. Rosen then told them that he didn't want them involved in union activities any more; that they were getting him into trouble; that he could lose his job; that John Jeffords (vice president, production) ''was getting down on him''; and that he could be fired (Tr. 68). Rosen then added: ''[i]f [you] continue[d] [your] union activities and [I can] no longer con-

[9] During the hearing, Rosen was called as an adverse witness by General Counsel but failed to testify, in any case, on the matters appearing above in the text.

trol [you], pretty soon [you won't] be dealing with [me], but [you'll] be dealing with [director of research and development, supervisor over the quality control departments in plant 1 and plant 4] Martin Bembers'' (Tr. 69).

At the time of this conversation, Martin Bembers was not involved in the day-to-day supervision of the quality control employees (Tr. 69). Bembers had informed quality control employees who came to him with problems that they should go to Supervisor Rosen and not to him because he did not have time to ''handle every problem'' (Tr. 1237). About a week later, by April 26, 1988, Bembers had taken, and retained, control over employee discipline in the quality control department (Tr. 1237–1238). Day-to-day problems including discipline, were formerly matters only for Supervisor Rosen (Tr. 69–70), not Bembers (Tr. 70). Indeed, while Bembers sometimes spoke to the plant manager on the work floor, he was not often in the plant and never in a supervisory role (Tr. 71).

Bembers denied that Vice President Jeffords had either put pressure on Supervisor Rosen or himself to control the quality control employees in their union activities (he admittedly could not answer for any action that Jeffords had taken with regard to Rosen (Tr. 1239)); and he denied that Jeffords spoke to him concerning Rosen not controlling the quality control employees (Tr. 1239).

When Rosen was called as an adverse witness by General Counsel, he testified that in April or May 1988, Jeffords explicitly ''advised'' him that he had to control the quality control employees with regard to their union activities (Tr. 1371–1372). In cross-examination of Rosen, his own supervisor, counsel for Respondent then put the following leading questions (Tr. 1373):

> Q. Isn't it a fact that what Mr. Jeffords told you was that you were expected to control the Quality Control Union activities in the plant on the job?
>
> A. That is correct.
>
> Q. Did he specifically so state?
>
> A. That is correct.
>
> Q. Did he tell you to control any of their union activities when they were on breaks or on their own time?
>
> A. No, Sir.[10]

Commencing with mid-April, after the filing of the election petition, Bembers, having taken over control of discipline of quality control employees, specifically, and for the first time, discussed company rules and policies with the employees (Tr. 71). By the first week of May, while employee Farkas was on her way to a morning break, Bembers stopped her, gave her a checklist of items concerning the rules described in the company handbook, and told her that, ''from now on we would be enforcing the rules, all the rules'' (Tr. 72). Bembers then mentioned rules that he was speaking of: there would be no ''leaning,'' no loitering, no reading books, no sitting on boxes, no using the office telephone (Tr. 72). With regard to the enforcement of ''no loitering,'' Bembers told Farkas that *he* would determine what the definition of loitering was (Tr. 72).

Farkas knew of no written policy concerning the use of the office telephone. The actual prior custom, however, was that if the quality control employees needed to call home or had a problem (i.e., car trouble) they used the phone.

Discussion and Conclusions

As General Counsel's brief repeatedly asserts, Supervisor Rosen was not called by Respondent in its own case to defend against employee Farkas' testimony concerning the alleged mid-April 1988 threat: that Rosen said that he didn't want the quality control employees involved in union activities any more; that they were getting him in trouble with such activities; that Vice President John Jeffords was ''getting down on him''; that he could lose his job; and that if they continued in their union activities and he could no longer control them, pretty soon they wouldn't be dealing with him, but would be dealing with Martin Bembers (Tr. 68–69). On the failure of Respondent to present contrary testimony directly from Supervisor Rosen, and especially since he appeared, under subpoena, as an adverse witness by General Counsel, and failed to address this conversation, I would credit General Counsel's witness and find that Rosen's threat of stricter supervision over quality control department employees because of their failure to desist in their union activities violated Section 8(a)(1) of the Act as alleged. *Northern Wire Corp*., 291 NLRB 727 (1988). enfd. 887 F.2d 1313 (7th Cir. 1989); *Olympic Limousine Service*, 278 NLRB 932, 936 (1986); *A.P.F. Electronics*, 257 NLRB 488 (1981).

Supporting this determination is the undenied and credited Farkas' testimony that Chairman of the Board Olson identified her, asked her in which department she worked when she distributed the handbill to him on October 13, 1987, and that she told him that she was in the quality control department. In addition, there is the credited testimony of quality control department employee Tina Noyes (Tr. 242) that Supervisor Schreiner told her, in October-November 1987, that ''[Q]uality Control has been known to be the root or the organizing point,'' ''the leaders of the Union campaign drive'' (Tr. 243). In addition, as above stated, this conversation was substantially corroborated by Tina Noyes concerning her arrival in the office during the Farkas-Rosen conversation; and particularly the Rosen's statements that he couldn't get control over the union activities quality control department employees; that Vice President John Jeffords was putting pressure on him; and that they would no longer be dealing with Rosen but with Martin Bembers (Tr. 245–246).

[10] I disregard Rosen's answers to such questions. Farkas' credited version contained no such limitations. Such answers, in any event, are merely the testimony of counsel. *H. C. Thomson, Inc*., 230 NLRB 808, 809 fn. 2 (1977). With regard to the overall crediblity of Respondent's witnesses, Bembers testified that Vice President Jeffords never talked to him about his feeling that Gale Rosen was not controlling the quality control employees and that Jeffords never put ''pressure'' on him to control quality control employees (Tr. 1239). Gale Rosen testified, however, that Jeffords had ''advised'' him to control the union activities of quality control emloyees. This occurred in a ''conversation with Jeffords'' (Tr. 1372–1373). Jeffords testified, however, that he never, during calendar year 1988, personally met with supervisors or assistant supervisors to instruct them regarding union campaigning (Tr. 992). Therefore, either Rosen or Jeffords is incredible regardless of what the instructions to Rosen were (even if they were limited to controlling union activities on worktime, as counsel's leading questions, above, suggested). Absent the semantical problem of the meaning of the word ''advised,'' there was at least a conversation and a *meeting* at which Jeffords ''advised'' Rosen. I conclude that Jeffords' testimony, in the face of Farkas' and Rosen's credited testimony, is unbelievable and that he testified falsely in denying that he ever had a ''meeting'' or ''conversation'' with any supervisors with regard to employee union activity, inter alia, of the quality control department employees. If Jeffords, for instance, relies on never having performed these acts ''in calendar year 1988'' as an adequate negation of Rosen's testimony, I would regard it as mere duplicity and casuistry.

In cross-examining Supervisor Rosen, who appeared to me, as might be expected, a concerned and vulnerable witness in view of his direct examination admission of the *conversation* between himself and Vice President Jeffords (Jeffords had already denied meeting with supervisors to instruct them on union campaigning), counsel for Respondent was not content to elicit from Supervisor Rosen further or other elements of his conversation with Vice President Jeffords; rather, with the greatest emphasis, he examined Supervisor Rosen with pointedly leading questions:

> Q. Isn't it a fact that what Mr. Jeffords told you was that you were expected to control the Q.C. union activities *in the plant on the job*? [Emphasis added.]
> A. That is correct.
> Q. Did he specifically so state?
> A. That is correct.
> Q. Did he tell you to control any of their activities *when they were on breaks and on their own time*?
> A. No, Sir.
> Mr. Hols: Nothing further (Tr. 1373).

In view of the testimonial contradiction between Supervisor Rosen and Vice President Jeffords, which necessarily impeaches Jeffords' credibility concerning whether there was any *meeting* or *conversation* relating to his instructing supervisors on union campaigning, I would ordinarily expect great care to be exercised in any cross-examination of Rosen. But when the examination takes the form of counsel for Respondent putting his own words in the mouth of a friendly supervisor, I disregard Rosen's answers to these leading questions. I thus find that Jeffords admonished Rosen, generally, to control the union activities of the quality control department employees rather than to control such activities on worktime in the plant.

I therefore conclude, consistent with the allegations of paragraph 5(a) of the complaint, that on or about April 19, 1988, Supervisor Gale Rosen, in violation of Section 8(a)(1) of the Act, told employees that their union activities could cost him his job and threatened them that they would no longer be dealing with him but would have to deal with Martin Bembers, the director of research and development, if Rosen could not control the quality control employees' union activities.

With regard to paragraph 6(b) of the complaint, the credited testimony of General Counsel's witnesses Farkas and Noyes shows that prior to mid-April 1988, though Bembers was ultimately responsible for supervision of the quality control department in plant 4 and was Rosen's immediate supervisor, he did not play a day-to-day role in the running of the quality control department either with regard to the production function or the discipline of employees. Rather, Bembers was seldom sought out for advice or direction and then only in Rosen's absence. The employees went to Rosen with their day-to-day problems. Bembers, in particular, was never involved in the discipline of quality control employees or in communication to them of company rules and policies.

By late April, early May 1988, this picture had changed.[11] Rosen's threats of both the substitution of Bembers as the more onerous quality control supervisor along with the concomitant enforcement of more onerous working conditions (due to the strict enforcement of Respondent's work rules) were effectuated. Thus, by late April and early May 1988, Bembers distributed to the quality control department employees an ''orientation check list'' (R. Exh. 4). This checklist contains various prohibitions on employee conduct including an admonition to receive and read the company handbook (R. Exh. 1; the handbook does not prohibit solicitation or contain a ''no-solicitation rule''). The major subdivisions of the orientation checklist relate to rules concerning sanitation, absenteeism, injuries, and lunchbreaks. There is no handbook particularization of any employee misconduct relating, for instance, to the use of the telephone or employee deportment while working.

In any event, when Bembers gave Farkas the ''orientation check list,'' he told her that ''from now on we would be enforcing the rules, all the rules.'' (Tr. 72.) Among these rules he mentioned, not actually or implicitly listed anywhere in the ''orientation check list,'' were prohibitions against ''leaning,'' reading of books, sitting on boxes, using the office telephone and particularly ''loitering.'' Bembers told Farkas that it was *he* who would determine the definition of loitering (Tr. 72). Prior to that time, the quality control employees customarily used the office telephone for the solution of domestic problems, paying bills, car problems, and similar issues (Tr. 72). In addition, there is no dispute that commencing at about this time, Bembers stood behind the racks of turkey observing Farkas on breaktime (Tr. 132).

Therefore, consistent with the allegations of paragraph 6(b), I conclude that Respondent, in or about early May 1988, by substituting Martin Bembers as the quality control department de facto, day-to-day supervisor, thereby substantially superseding Supervisor Rosen in the supervision of quality control department employees, Respondent effectuated the Rosen threat of April 1988: that Respondent, through Bembers, would impose more onerous working conditions under stricter supervision; and by the actual imposition, by Bembers, of stricter supervision on the employees, violated Section 8(a)(1) and (3) of the Act, as alleged.

The well-established Board rule, enforced by the courts, is that an employer violates Section 8(a)(3) and (1) of the Act when it increases discipline among its employees in response to their engaging in union activity. *Upland Freight Lines*, 209 NLRB 165 (1974), enfd. 527 F.2d 766 (9th Cir. 1976). If the General Counsel demonstrates that the pattern of discipline after the commencement of union activity deviated from the pattern prior to the start of union activity, a prima facie case of discriminatory motive is established requiring the Respondent to show that its increased discipline was motivated by considerations unrelated to its employees' union activities. *Keller Mfg. Co*., 237 NLRB 712 fn. 7 (1978). Cf. *Northern Wire Corp. v. NLRB*, supra, 291 NLRB 727 (1988). The issuance of warnings pursuant to stricter enforcement constitutes a further violation of Section 8(a)(3) of the Act. *Dynamics Corp. of America*, 286 NLRB 920, 921 (1987).

C. *Respondent's Rules and Their Enforcement*

I have examined both the Respondent's employee handbook (R. Exh. 1) and the orientation checklist (R. Exh. 4), both distributed by Bembers in the first week of May to only

[11] By late June, 4 days before the election, the ''pressure'' Rosen felt apparently caused him to prevent union sympathizers from even sitting together in the lunchroom on ''breaktime.'' See, below, par. 5(n) discussion.

the quality control employees (whom Respondent identified as the focus of union activity) that he was now supervising.

The handbook does not refer to employee deportment, including leaning, sitting, or standing, nor to reading the newspaper or eating in the breakroom. It merely prohibits employees from punching timecards other than their own; forbids tardiness and absence; deals with requests for time off and leaves of absence; describes two paid 15-minute rest periods in each 8-hour day; the fact that the lunch period is not paid by the company; describes the need for personal cleanliness and uniforms; permits employees to be called from their work station to answer emergency phone calls; permits messages to be passed to the employee from the supervisor or the plant receptionist; deals with safety and first aid; and specifically prohibits the use of alcohol or drugs, theft, fighting, insubordination (failing to carry out a directive from a supervisor or security personnel), intimidation of coemployees, violation of safety rules, disorderly or immoral conduct, possession of firearms, willful damage of company property, loitering in the restrooms, engaging in horseplay, profane or vulgar language, and smoking in prohibited areas. Otherwise, the handbook deals with life insurance, pension plans, group health insurance, funeral leave, vacation and holiday pay, and a prohibition against visitors in the production area.

The orientation checklist directs employees to read the employee handbook, to observe sanitation regulations; notifies employees of a 2-week trial probationary period and the existence of health and life insurance eligibility. Otherwise, the orientation checklist deals with absenteeism, injuries on the job, and lunchbreaks. With regard to the one-half-hour lunchbreak, the employees are reminded that they must punch out for the lunchbreak.

Bembers testified that in his talks with the employees, while handing out the rules, he also made clear how *other rules* were being violated, violations which he had seen. These included leaning against walls (Tr. 1160) and eating in the breakroom. In particular, Bembers said he had seen Susan Sander, apparently in a 4-month period, leaning against a wall with her hands folded and one foot up against the wall watching things from a distance. Bembers then told each of the quality control employees that they were no longer to be permitted to do various things: using the telephone during work time to take care of personal matters such as car repairs (Tr. 1161).

General Counsel's theory is that the ''don't instruct'' rule announced by Vice President Jeffords in October 1987 degenerated into a ''no-talking rule'' which Bembers and other supervisors discriminatorily applied to prevent suspected union conversations initiated by quality control employees (Tr. 91–92).

Respondent asserts (R. Br. 4) that the General Counsel makes no claim that either the no-instructing rule or its reinstatement were violations of the Act. Indeed, the evidence shows, according to Respondent, that prior to the October 1987 announcement of the fact that the rule against quality control employees doing any ''instructing'' would be enforced, there was evidence that the quality control personnel *did* instruct line employees directly and that Respondent wanted this changed. Respondent further argues that it had a ''perfectly legitimate non-discriminatory'' reason for interrupting discusisons among employees; that it had a right to avoid disruptions of work that take place on worktime. Moreover, Respondent argues that applying such a rule only against the quality control department and not against production employees is bottomed on the conclusion that Respondent viewed ''with far less gravity'' (R. Br. 4) workplace discussions among production employees than such discussions between quality control employees and production employees.[12] Furthermore, Respondent argues that it is irrelevant as to what the employees are saying on the work floor. Thus a quality control employee talking to a production employee might or might not be talking about the Union; but, whether or not this is true, Respondent has a right to prevent such conversations on work time. In particular, Respondent defends the above Gale Rosen threat of Bembers becoming their supervisor (if he could not control them) and Bembers' strict enforcement of the rules on the ground that if Respondent had right to enforce the no-instructing rule, it had a right to tell employees that the rule would be enforced and had a right to utilize any available supervisor to enforce it (R. Br. 14). In support of this conclusion, Respondent cites *Peyton Packing Co.*, 49 NLRB 828 (1943), for the proposition that the employer has a right to forbid employees to engage in oral solicitation when they are expected to be at work. Indeed, the *Peyton Packing* rule has been restated in *Our Way, Inc.*, 268 NLRB 394 (1983).

In view of General Counsel and Respondent lengthy arguments on this matter, it is discussed in some detail.

1. The promulgation of the ''no-instruction'' rule; its expansion and enforcement in the 10(b) period

Vice President Jeffords testified that a week before the October 19 meeting at which he announced the ''no-instruction rule,'' there had been an incident wherein a quality control employee had instructed one of the employees on the production line to put certain labels on a product which resulted in costly mislabelling (Tr. 986). Jeffords testified that the quality control employees' function was to see that the product was handled properly and, if not, to stop the production line. On the other hand, the function of supervisors was to supervise (Tr. 987). There is no question that the quality control employees are not supervisors and do not control the conduct of employees on the production lines where their authority is only to see that quality control is observed. Prior to the October rule, Bembers admitted that quality control employees routinely talked to production employees concerning production problems (Tr. 1231).

On the other hand, the evidence shows that Farkas, while handing out union leaflets on October 13, 1987, 6 days prior to the inauguration (or reinstatement) of the rule by Jeffords, was asked by Chairman of the Board Olson, for the identity of the department in which she worked. When she truthfully responded, she identified the quality control department as the department in which the sole employee distributing union leaflets was employed (Tr. 60). A few days later, Jeffords announced the no-instructing rule. In late October or early November, Respondent identified the quality control department as being the ''root'' of union organizing (Tr. 240–243). Nowhere does there appear an allegation that the promulga-

[12] There was no rule against production employees talking to each other during actual work. Why their talking was less important than that of quality control employees is not entirely clear.

tion of the rule constituted an unfair labor practice.[13] Yet General Counsel points to the timing (Tr. 994) of the Jeffords' inauguration enforcement of the ''no-instructing'' rule as coming only a few days after Olson's identifying the departmental source of employment of the employee distributing the union handbills and about the same time Respondent acknowledged that department as being the ''root'' of union organization.

With the continuation of union activity among the quality control employees in the early spring of 1988, following a winter lull, there next appears the unlawful April 1988 threat by Supervisor Rosen concerning the continuation of his employment and the substitution of Martin Bembers as their supervisor if their union activities continued. Aside from Rosen's answers to the leading questions propounded by Respondent which I have disregarded, there is nothing in the testimony of General Counsel witnesses (Farkas, Noyes) or of Supervisor Rosen (on direct examination) that would indicate that Rosen's April 19, 1988 plea that quality control employees cease their union activities (on pain of his losing his job and the accompanying threat of their getting Bembers as a tougher supervisor) was limited to a prohibition against instructing employees on the production line rather than directing their remarks to the employee supervisors. And there is nothing in Rosen's plea and threat of April 19, 1988, to indicate that he was merely attempting to prohibit union activities on work time. There can be no question, in addition, that Respondent, through its top supervisors, engaged in ''captive audience speeches,'' however lawful, demonstrating to employees Respondent's opposition to the Union becoming their collective-bargaining representative.

Moreover, in addition to these demonstrations of unlawful and lawful opposition to the Union, there is evidence that Supervisor Rosen, on or about June 20, 1988, apparently interpreted the ''no-instructing'' or even Bember's new ''no-talking'' rule to be broader than prohibiting any and all conversations by quality control employees on their worktime with line employees. Rather, in the lunchroom, as will be seen, after Respondent's June 20, 1988, ''captive audience speech'' to massed employees (i.e., 4 days before the election) a group of quality control employees (Farkas, Noyes, Sander, and Porter) was sitting together in the employee lunchroom, on breaktime. Supervisor Rosen approached them and asked if they would ''mind'' splitting up. When he then added that two of them should go some place else while the other two should sit at a different place, Noyes asked: ''Are you crazy''? (Tr. 101, 271–272) Farkas testified that Rosen made this suggestion in the presence of four or five production employees (Tr. 272) who yelled to Rosen: ''Yeah, you've got to separate the sheep before they multiply.'' Rosen then told the quality control employees: ''I was just asking, I was just asking'' (Tr. 272).

Thus, the General Counsel takes the position that the October 19 Jeffords' specially directed quality control employees ''no-instructing'' rule was formulated and announced in response to and in retaliation against the ''root'' of the organizing drive; and, in any event, was thereafter the subject of discriminatory enforcement and enlargement (Tr. 993). I agree.

This rule and its enforcement was not based upon the faulty labelling incident, if true, allegedly occurring within a week before announcement of the rule, as testified to principally by Vice President Jeffords and Plant Manager Schmitz. Farkas' uncontradicted and credited testimony, that Rosen refused to discuss the origins of the new rule because to do so, would ''hang'' him, ''we all know why it came about'' (Tr. 93–94), cannot be considered ambiguous when Respondent identified the quality control department as the ''root'' of union organization to which Respondent was hostile. This testimony required contradiction and there was none. Further, Rosen testified that he was unaware of any improper instructions issued by quality control employees. There then follows the Rosen threat in April against continuation of union activities without suggesting a time or place where union activities (by the quality control empioyees) can be engaged in;[14] and a more generalized threat of more onerous discipline with the appearance of Martin Bembers if they did not cease their union activities. Bembers then arrives on the scene, inaugurates rules in April-May 1988 (within the 10(b) period) that nowhere appear in Respondent's handbook or organizational checklist and tells the employees that he is going to be the interpreter of the word ''loitering,'' leaving no doubt that the rules are going to be more strictly enforced: no further eating in the breakroom by quality control employees and no further worktime use of the telephone, both of which had been the custom before Bembers became active in the discipline of quality control department employees. By June, Rosen was attempting to separate the suspected prounion employees even on their break periods. They were suspected of engaging in conversations concerning the Union. Since nearby coemployees derisively chided Rosen for attempting to ''separate the sheep before they multiply,'' it is clear what the employees saw as Rosen's motivation.

The intent of the original, narrowly configured ''no-instructing'' rule in October 1987 having itself been animated by a retaliatory, antiunion motive, and with due regard for the above subsequent activities of Supervisors Rosen and Bembers in January, April, May, and June 1988, I conclude that this original narrow rule had blossomed into a complete no-talking, no-socializing, no-communicating, no-sitting together rule directed solely at quality control department employees whom Respondent believed were the root of union activities among its employees. Such activity, under the mantle of an unlawfully configured rule, unlawfully isolating union activists from each other and from other employees, on worktime and breaktime, in work areas and nonwork areas, is unlawful interference in violation of Section 8(a)(1) when, as here, it occurs within the 10(b) period.

Four other elements demonstrate antiunion motivation[15] in the enforcement of the no-instructing, no-talking rule in the period April through June 1988. The first is that the production employees always talked on the line without disciplinary consequences; the second is that the quality control department employees testified, without contradiction, that, after the June 1988 election, the no-instructing, no-talking rules were relaxed and they could talk again with employees on

[13] The first unfair labor practice charge was not filed until June 20, 1988. The statute of limitations in Sec. 10(b) of the Act would appear to constitute a bar.

[14] As early as January 1988, Rosen cautioned employees against talking to each other (Tr. 96–100) even if he gave permission.

[15] Bembers testified that quality control employees talking to production employees did not become a problem until the approaching election (Tr. 1228–1229).

the production line without disciplinary consequences (Trs. 133; 236–237; 254–255). Thirdly, it is undenied that, at all material times, production employees, including supervisors, on the production line, regularly solicited *during worktime* for various commercial and noncommercial objectives including mutual funds (Tr. 136), Avon products (Tr. 136), and Christmas wreaths (Tr. 137), all of which were sold from employee to employee and from employee to supervisor (Tr. 137). In addition the employees spoke of sports and gardening and other everyday topics while they were on the production line, all without discipline or admonition. This failure of Respondent's interest in the interference with work resulting from talking of its production employees and its concentration only on the alleged interference by quality control department employees further supports the inference of a particular motivation stemming from the union activities of the quality control department employees.[16] Lastly, Supervisor Torkelson, in May 1988, observed and failed to report talking by quality control department employees other than Sander. Respondent, in this Sander's incident, was attempting to interfere only with *union* solicitation, not ''talking'' or ''instructing.''

It therefore follows, and I conclude, that Respondent's enforcement of this expanded rule in the 10(b) period was unlawful. The citation of *Peyton Packing Co*., supra, and *Our Way, Inc*., supra, at 394 can offer no defense. We are not here concerned with the maintenance or enforcement of a technically overbroad no-solicitation rule; rather, we are concerned with the enforcement of a discriminatory, expanded rule applied within the 10(b) period to a single group of employees known or suspected to be the font of union activity. The application of the new no-talking and/or no-solicitation rule and no-socializing rule, first expanded by Bembers in April-May 1988, was extended to the employees' own breaktime and was discriminatorily enforced only against known union advocates among quality control employees allegedly for the purpose of preventing interference with production. Bembers conceded that he never personally observed any quality control employee talking on the production line even though he was allegedly on the production floor 75 to 80 percent of his time during the period October 1987 to May 1988 (Tr. 1289). Nevertheless, Bembers claims that it was the frequency of quality control employees talking *prior* to the rule's implementation that justified its creation. Again, Supervisor Rosen knew of no improper instructions by his employees and he was the department supervisor.

In finding the above violations of the Act based upon Respondent's enforcement of the no-talking, no-socializing, no-instruction rule, as first expanded in the 10(b) period, I am mindful that General Counsel's consolidated complaint did not allege that the *promulgation* of the rule, in mid-October 1987, in any way violated the Act. While this may have been due to the strictures of Section 10(b) of the Act (a statute of limitations which extinguishes liability for unfair labor practices committed more than 6 months prior to the filing of unfair labor practice charge, *NLRB v. Fant Milling Co*., 360 U.S. 301 fn. 9 (1959)), yet evidence relating to the timing and discriminatory motivation of the rule, *Machinists Local 1424 (Bryan Mfg.)*, 362 U.S. 411 (1960), is useful background to show that Respondent's *enforcement* and expansion of the rule within the 10(b) period into a no-talking and no-socializing rule applied indiscriminately as to time and place was unlawful. While I have not given independent and controlling weight to the testimony derived from events outside the 10(b) period, I have found that such testimony tends reasonably to show the purpose and character of particular transactions within the 10(b) period under the expanded rule. *Federal Trade Commission v. Cement Institute*, 333 U.S. 683, 705 (1948). I have made my findings and conclusions from the record considered as a whole with regard to Respondent's interfering with, restraining, and coercing the quality control department employees in their engaging in union activities pursuant to a rule free from attack in its promulgation, but nevertheless the source, due to expansion and indiscriminate application, of unlawful enforcement.

I have concluded that the issues of the motivation for the original and expanded rules as well as their enforcement were fully and fairly tried throughout the hearing. Respondent adduced testimony on the issue (Tr. 1147). In short, I find that the enforcement of rules restricting conduct of quality control employees within and without worktime and workplace, in the period since January 21, 1988, was unlawful under Section 8(a)(1) of the Act. Although the original no-instructing rule, lawful on its face (G.C. Exh. 3) was promulgated in retaliation for the quality control department employees engaging in handbilling and perhaps other union activities, I find only an improper motive but not an independent violation of the Act with regard to the promulgation.

That Farkas was never disciplined for her union activities engaged in on nonworktime is irrelevant to whether Respondent interfered with and coerced employees in their Section 7 rights by reminding them of the existence, maintenance, and restrictions of unlawful rules. Discipline involves violation of Section 8(a)(3); coercive rule maintenance and enforcement is a violation of Section 8(a)(1)—with or without discipline. While Sander admitted that Rosen on one occasion told her he was not concerned with her union organizing on breaktime, neither he nor any other supervisor told Noyes or Farkas that they could engage in organizing in the plant on breaktime (Tr. 280). In addition Rosen showed that he was interested in coercing suspected union adherents on nonworktime in the break area.

[16] Where Bembers testified that he had received complaints (from unidentified sources) that quality control employees were abusing their breaktime, and when he commenced timing the bathroom stops of quality control department employees, Respondent had carried its strict enforcement rule among its quality control department employees to a strange length (his timing of bathroom stops had not occurred before (Tr. 110). Bembers denies that he was timing Farkas in the bathroom (Tr. 1218). In spite of his denial, Farkas says that she saw him looking at his watch when she emerged from the bathroom after his inquiring of Assistant Supervisor Torkelson whether she was in there (Tr. 111). While I make no finding that he explicitly was timing her in the bathroom, his evident interest in her whereabouts (absent some showing of Farkas' prior chronic loitering therein), takes on a strange hue for the research and development director, a Ph.D., overseeing, inter alia, a multiplant quality control department. Further, since Supervisor Schreiner did not deny telling employee Tina Noyes, in late October or early November 1987, that the quality control department was the root of union organization, it was unimpressive for Bembers to deny that it had been reported to him as well (Tr. 1216).

2. Particular enforcement of the rule during the 10(b) period

a. *Paragraph 5(g); Bembers May 2 threat of stricter enforcement of rules*

Shortly before the parties submitted their briefs on or about October 25, 1989, the Board issued its decision in *Dynamics Corp. of America*, supra. In that case, the Board not only agreed with the administrative law judge in finding that the employer had violated Section 8(a)(1) of the Act by instituting against union activists (after a Board-conducted election) the stricter enforcement of an attendance and punctuality policy that had been suspended pending the outcome of the election, but the Board modified the judge's decision by holding that the issuance of any warnings pursuant to strict enforcement also constituted an independent violation of Section 8(a)(3) of the Act. It further ruled that any warnings issued pursuant to the stricter enforcement of the rules were to be rescinded and expunged.

There is no substantial dispute concerning Supervisor Bembers' conduct in late April 1988, shortly after he became substantially interested in the discipline of quality control employees. Thus, as Farkas testified (Tr. 71–72) and as Bembers confirmed (Tr. 1159–1160), Bembers told Farkas that from now on the Respondent would be ''enforcing all the rules.'' It was at this time, as above noted, that he handed her the orientation checklist which she had never seen before. Whether these are considered new rules or stricter enforcement of existing rules, under *Dynamics Corp. of America*, supra, such considerations are irrelevant. See *Northern Wire Corp*., 291 NLRB 727 (1988). Further, according to the credited Farkas' testimony, Bembers underlined the stricter enforcement, and his subjective determination of stricter enforcement, by telling Farkas that, with regard to the newly instituted ''no-loitering'' rule, it was Bembers who would determine what the definition of loitering was (Tr. 72).

As above-noted, the Jeffords October 1987 rule forbade quality control employees only to ''instruct'' line employees. Bembers testified that because Kevin Anderson had left Respondent's premises without punching out, in order to remind employees of Respondent's rules, he had individual conversations with employees at which he distributed Respondent's handbook (R. Exh. 1) and an orientation checklist (R. Exh. 4) regarding Respondent's rules concerning employee conduct. In neither of those documents is there any suggestion that Respondent forbade loitering, leaning, use of Respondent's facilities for luncheon at breaks, etc. In these discussions with the quality control employees, however, Director Bembers told them that he would forbid loitering, leaning, breaks in the quality control area, and a more stringent rule regarding use of telephones. (Tr. 1159–1160: 207.) These latter items were new prohibitions that the employees had never heard of (Tr. 72, 207). Thus, as alleged in paragraph 5(g) of the complaint, Respondent violated Section 8(a)(1) of the Act by Bembers, in the first week of May 1988, threatening the quality control department employees with additional work rules and stricter enforcement of existing work rules. This result flowed from Supervisor Rosen's April 19 prediction, based on employees' union activities.

b. *Farkas, Noyes, and Sander as objects of unlawful discrimination; discriminatory enforcement*

The uncontradicted and credited testimony of Tina Noyes establishes that Respondent knew that its employees in the quality control department were the root of union organizational activity as early as late October, early November 1987 (Tr. 241–243). Chairman of the Board Olson had identified the source of the union problem and Supervisor Schreiner left no doubt that Respondent's supervisory hierarchy knew of it. As noted below, Assistant Plant Manager Nelson knew that Sander, Farkas, and Noyes were union supporters (Tr. 941–942).

Bembers denied ever having been told that the quality control department was the focus of union organizing. In view of Supervisor Nelson's testimony and Supervisor Schreiner's statement, above, I find this testimony was untruthful. He admitted only that he knew that several department employees were active in the Union. Sometime in May 1988, Bembers and Rosen told Assistant Supervisor Torkelson to report quality control employees for talking on the production line (Tr. 1009). When Torkelson observed other quality control employees talking (Tr. 1241) there was *no discipline* because *he did not report them* to Bembers. When he reported Susan Sander to Bembers, Bembers on May 2, 1988, directed that a written warning against her should issue (Tr. 1012–1013).[17]

Assistant Plant Manager Nelson testified that although Bembers' ''no-talking'' rule ''technically'' applied to all quality control employees (Tr. 940–941), it actually was applied only against Noyes, Sander, and Farkas, known by Respondent to be union supporters (Tr. 941–942). The rule was enforced against these employees, according to Nelson, because they were the only employees not abiding by the ''no-talking'' rule (Tr. 941).

It is clear from the above testimony that Torkelson thus contradicts Nelson and that the ''no-talklng rule'' was being disparately enforced: Torkelson failed to report to Bembers quality control employees, other than Farkas, Noyes, and Sanders, he observed talking in violation of the rule; but he reported Sander and discipline was applied against her as a known union supporter.

In short, I conclude that the original no-instructing rule promulgated by Jeffords outside the 10(b) period had discriminatory purpose; that in its evolution within the 10(b) period into a total no-talking rule, it had, as its first purpose, Respondent's squelching of union conversations on worktime and at workplaces rather than the squelching of instructing, in particular, or quality control employees talking, in general; and that it was enforced disparately against Noyes, Sanders, and Farkas (whose quality control work places took them to various production lines) because they were the union organizers and activists. It was not enforced against other quality control employees who were similarly talking. As a second purpose, as will be seen below, the rule's object was enlarged to include interference with union supporters' suspected union conversations in nonwork areas during nonwork time.

[17] Bembers had admonished Torkelson in April or May 1988 to spend more of his time observing whether quality control employees were talking to line employees. Torkelson did not report such talking after the May 2 Sander incident (Tr. 1013).

c. *Verbal and written warnings to Farkas, Noyes, and Sander; suspension of Susan Sander*

I also conclude, as alleged, as hereafter separately discussed, that Respondent, in its verbal warnings of April 28, May 19, and June 8 to Sander, Noyes, and Farkas; its June 17 written warning to Noyes; and its July 21 warning to Sander, violated Section 8(a)(1) and (3) of the Act because the warnings were issued to enforce a rule, expanded within the 10(b) period, whose promulgation outside the 10(b) period was discriminatory in motivation; and whose enforcement within the 10(b) period was unlawful in both its discriminatory object and its disparate nature. See *Dynamics Corp. of America*, supra; *Arthur Young & Co*., 291 NLRB 39 (1988), enfd. mem. per curiam 884 F.2d 1387 (4th Cir. 1989).

While an employer may lawfully forbid employees to talk about the union during worktime, that prohibition, to be held lawful, must extend to all nonwork subjects and to all employees within the group. Where an employer forbids employees to discuss unionization on worktime but permits discussion of other subjects unrelated to work, the disparate rule is itself unlawful. *Orval Kent Food Co*., 278 NLRB 402, 407 (1986). It would appear to be a fortiori application of this rule where, as here, it is only union advocates who are punished for ''talking.'' If, as Supervisor Torkelson admitted, he did not report other talking quality control employees, only union *advocates* are targeted for ''talking.'' Where, in addition, the discriminatory rule is disparately enforced, it is irrelevant that Noyes, Farkas, or Sander may well have been talking about the Union on worktime and in workplaces. *Orval Kent Food Co*., supra; *Robinson Furniture*, 286 NLRB 1076 (1987); and *SMI Steel*, 286 NLRB 274 (1987). The otherwise lawful enforcement of an unlawful rule renders the enforcement unlawful. *Asociacion Hospital del Maestro v. NLRB*, 842 F.2d 575, 577 (1st Cir. 1988), a fortiori unlawful if the *enforcement*, as here, is discriminatory.

(1) The April 28 verbal warning to Susan Sander; paragraph 6(h) of the complaint

On the morning of April 28, Bembers told Susan Sander that she had been reported as having been seen talking to another person on the floor about union matters. Although Sander denied having ''pestered'' any employee, she told Bembers she was aware of no rule against talking. She told him that the only rule was Vice President Jeffords' 1987 rule against instructing but there was no rule against talking. Bembers nevertheless told her he didn't want her to talk to employees at all (Tr. 654). The employee to whom Sander allegedly spoke was never identified by Bembers and the verbal warning which Bembers entered into her file was never shown to her nor did she know about it until immediately before the hearing. I conclude that this verbal warning was issued as part of the above-described disparate enforcement of the rule against talking and was implemented only against union advocates. Thus Bembers April 28 verbal warning to Sander is unlawful.[18]

(2) The written warning to Susan Sander of May 2, 1988, paragraph 6(a) of the complaint

Two workdays after Sander received the above verbal warning, she received a written warning. As General Counsel notes (Br. 21), verbal warnings were not in existence before April 1988, and thereafter became effective only for the quality control department (Tr. 1242).

In April, Bembers had ordered Assistant Supervisor Torkelson, for the first time, to be on the lookout for talking by quality control employees. Sander had seen other employees talking on the line, in the presence of supervisors, without disciplinary consequences. Torkelson told Bembers that he saw Sander talking to two employees. He had seen other quality control employees talking to employees on the production line but did not report them to Bembers (Tr. 1007). Thereafter, on May 2, Sander was called to a meeting with Bembers and Torkelson who wrote out a written warning notice (G.C. Exh. 5) charging Sander with insubordination. As above-noted, Sander's union activities were well known to Respondent and the May 2 written warning notice, the result of disparate enforcement of the discriminatory rule against talking (since Torkelson had not reported other quality control employees talking to production employees on the line) constitutes a violation of Section 8(a)(1) and (3) of the Act.

(3) The verbal warning to Susan Sander of May 19, 1988; paragraph 6(i) of the complaint

On May 19, 1988, Bembers placed a further verbal warning in Sander's file without telling her of the existence of this document (G.C. Exh. 31). The verbal warning mentions that she was not at her duty station and was seen talking to production personnel. It is uncontradicted that Sander did not learn of the existence of this document until immediately before the unfair labor practice hearing. Bembers testified that he never told Sander of its existence and never provided her with a copy. I conclude this undisclosed verbal warning of May 19 constitutes a violation of Section 8(a)(1) and (3) of the Act.

(4) The verbal warnings of June 8, 1988; Susan Sander, Sarah Farkas, and Tina Noyes; complaint paragraphs 6(c), (d), and (j)

On June 8, Bembers issued a verbal warning to the three quality control employees known by Respondent (Assistant Plant Manager Nelson, Supervisor Schreiner) as the union activists: Farkas, Noyes, and Sander.[19]

(1) The verbal warnings of June 8 are all the same (G.C. Exhs. 4, 6, 29) and assert that each of the employees was ''not performing her assigned duties properly.'' When Farkas asked Bembers and Assistant Plant Manager Nelson precisely what that meant, they told her that she had been engaged in union organizing and the employee witness to this was em-

[18] Respondent asserts that verbal warnings are not part of its disciplinary system. Verbal warnings, a creation only of Director Bembers and only for quality control department employees and only disparately issued to union ''talkers,'' are part of the disciplinary system because they are issued with the admonition (Tr. 161) that the ''next time,'' the recipient would receive a *written warning*. (G.C. Exh. 30.) Respondent concedes only that written warnings are part of the progressive disciplining system. Respondent, however, characterizes a verbal warning as an ''offense,'' which thereafter, for further offenses, leads to suspension and discharge (e.g., G.C. Exh. 14). It is thus ''integral to employee discipline,'' *Kal-Equip Co*., 237 NLRB 1234 (1978).

[19] Each of these employees was employed no less than 5 years by Respondent. The only discipline that any of them had ever received was a written warning to Tina Noyes in 1983 for failing to telephone prior to being absent (Tr. 263). Other than that, neither Noyes, Farkas, nor Sander had ever been reprimanded or disciplined in any way.

ployee David Engwal. Farkas admitted speaking to Engwal but denied talking to him about the Union. Engwal corroborates Farkas and testified that they were talking about football (Tr. 404). Engwal denied ever telling anyone in management about the conversation but Bembers gave her a verbal warning (G.C. Exh. 4) for ''not performing her assigned duties properly.'' The warning memorandum notes that her improper work performance included distracting workers by campaigning for ''personal reasons.''

On the basis of the above, with Respondent knowing of Farkas' union activity, I conclude that this verbal warning, whether or not Farkas had been soliciting on behalf of the Union with Engwal, was the subject of disparate enforcement of a discriminatorily motivated rule and therefore in violation of Section 8(a)(3) and (1) of the Act. Other ''talking'' quality control employees were observed talking and not reported.

(2) On June 8, Respondent gave a verbal warning to Susan Sander ''for not performing her assigned duties properly.'' The warning memorandum notes that Bembers told Sander that she had been seen talking to several production workers and kept them from working. The memorandum notes that Sander denied the allegations.

The evidence is undisputed that Sander asked Bembers to identify who had been her accuser or the name of the employees or employee to whom she had been talking. Respondent refused to identify either her accuser or the name of the employees to whom she had been speaking. In the meeting, Bembers did not suggest any conduct other than Sander talking to employees on the production line. Bember's testimony (Tr. 1186–1187) discloses no misconduct by Sander other than that she was talking on the line.[20]

I conclude that by disparately enforcing the discriminatory rule against talking, permitting some quality control employees[21] to talk to production employees about nonwork subjects and restricting discipline to those whom Respondent perceived to be prominent union supporters, Respondent, by Martin Bembers, as alleged, violated Section 8(a)(1) and (3) of the Act on June 8 by issuing the verbal warning to Susan Sander.

(5) Bembers issued an identical verbal warning to Tina Noyes on June 8 (G.C. Exh. 29)

The memorandum of the verbal warning notes that several supervisors witnessed Noyes talking to production employees in which she was promoting the Union and ''degrading'' Respondent. The memorandum also states that on the next occasion, Respondent would give Noyes a written warning. As above-noted, Noyes had conversations about the Union with Supervisor Schreiner in one of which he told her (Tr. 242) as early as late October or early November 1987, that the quality control department was the ''root'' of union organizing in the union campaign drive (Tr. 242), and in which he also asserted that Noyes was a union organizer (Tr. 242, 297).

On June 8, Bembers told Noyes that he had received reports that she had been talking on the floor and he was giving her a verbal warning. He identified the supervisors who had seen her talking as Chuck Vilven and Les Goff.

Assuming that she was talking about the Union on the floor, the issuance of a verbal warning to her was the result of disparate enforcement of the no-talking rule based on knowledge that she was a union organizer. The disparate nature of enforcement is based on the fact that other quality control employees, as observed by Assistant Supervisor Torkelson, under orders from Bembers, talked to production employees on worktime on the production floor and were not reported or given verbal warnings or written warnings. I thus conclude that the Tina Noyes verbal warning of June 8 constituted a violation of Section 8(a)(1) and (3) of the Act as alleged in paragraph 6(j) of the complaint.[22]

(6) The written warning to Tina Noyes of June 15, 1988; paragraph 6(e)

On June 15, Noyes was called into the conference room by Bembers who told her that he was giving her a written warning for talking on the floor (Tr. 257) to two employees, Schmidt and Weigen. Noyes' supervisor, Gale Rosen, was present.

Noyes asked who reported her as having been talking. Bembers looked at Rosen and said he didn't know (Tr. 258) and when Noyes asked where the talking had occurred, Bembers again said that he didn't know. Noyes told them: ''This is bullshit'' (Tr. 285). Bembers told Rosen to get Alan Schmitz, the plant manager. Schmitz came to the room and told Noyes that she had been talking to employees Bill Schmidt[23] and Brad Wingen and that Assistant Supervisor Lester Goff could support him in his statement (Tr. 259).

Noyes denied talking to Schmidt and Wengen and refused to sign the written warning. Bembers handed the warning to Rosen and Schmitz who signed it.

The idea for issuance of the written warning allegedly came from Schmitz. His sworn statement to the Board contained the statement that it was his suggestion; but at the hearing, he was not sure that he had made the suggestion (Tr. 842). Schmitz admitted that he believed that Noyes was talking although he did not hear what she said. His usual practice, upon observing employees doing unnecessary talking, was simply to walk toward the employee and the employee would stop talking (Tr. 842). He did not do that in this case, however, but recommended that a written warning be issued. He said that the quality control employees had been ''instructing workers'' and there had been losses in the department (Tr. 843). He admitted, however, that since he did not hear what she was saying to the employees, he could not tell whether she was instructing anyone. When asked why he had not followed his usual practice and merely

[20] The document, however, states that Sander's conversations with the employees ''kept them from working'' (G.C. Exh. 6). His testimony (Tr. 1187) is to the same effect, ''interfering with production.'' Bembers, however, did not observe this conduct. His verbal warning to Sander was the result solely of a report from Supervisor Gerald Schreiner (Tr. 1186–1187). Schreiner testified at considerable length in the hearing against Sander. However, he in no way corroborated that in his report to Bembers concerning the alleged June 8 misconduct, Sander had interfered with other employees' production. On this record, therefore, I conclude that the interference with production, mentioned by Bembers, consisted solely of Sander speaking to the employees.

[21] Again, it should be noted that the rule against talking was only for quality control department employees. Production employees were free to talk to each other about anything.

[22] Pars. 6(j) and 6(i) were added and renumbered at the opening of the hearing. (G.C. Exh. 2.)

[23] The name Bill Schmidt appears widely in the transcript. It is apparently, actually, Bill Smith (Tr. 1323–1324).

walked up to her, as he had to other employees, so that his mere approach as plant manager would cause the employees to cease talking, Plant Manager Schmitz stated: ''I don't know why'' (Tr. 843). Finally, Schmitz testified that he departed from his practice of merely approaching employees because Noyes was ''instructing'' the other employees even though he could not hear what she was saying (Tr. 844). If he did not hear her instructing, I can hardly credit Schmitz' testimony.

This written warning given to Noyes on June 15 (G.C. Exh. 10), signed by Bembers, Schmitz, and Gale Rosen, shows the reason to be ''insubordination of published rules and company policies.'' Bembers testified that he issued the written warning because he had previously given Noyes a verbal warning (Tr. 1193) Thereafter, he directly contradicted Schmitz' testimony. Schmitz' prior sworn statement and his particularly reluctant testimony at the hearing (Tr. 841–842) was that it was he who suggested that a written warning be issued to Noyes for this June 15 talking. Bembers' sworn testimony at the hearing was that although he had received a report from the plant manager on the incident, the plant manager made no recommendation as to what ought to be done (Tr. 1193).

Tina Noyes whom Respondent knew to be a union organizer had been the subject of prior warnings by Respondent for talking. This written warning, so close to the June 24 election, was the next step in the discipline of Tina Noyes. The enforcement of the rule against talking was disparately applied to the perceived and suspected union supporters in the quality control department, known to be the ''root'' of union organizing among Respondent's employees. Since the written warning was based on the prior verbal warning, and since the prior verbal warning itself was unlawful, any further and progressive discipline based in whole or in part thereon, must itself be unlawful. *Asociacion Hospital del Maestro*, 283 NLRB 419, 425 (1987), enfd. 842 F.2d 575 (1st Cir. 1988).

Alternatively, even if the prior verbal warnings were not unlawful, the instant written warning was, again, the result of a discriminatory rule, enforced disparately. Written warnings, indeed verbal warnings, were not given to other quality control employees who were engaged in conversations with employees on the production line.

Thirdly, apart from the disparate unlawful application of the ''no talking'' rule, there is evidence, in this written warning situation, of the plant manager's (Schmitz') departure from his own rule of merely approaching employees engaged in the otherwise minor misconduct of talking. Prior to this occasion, he did not issue or recommend warnings, a fortiori, written warnings. He merely approached employees and they ceased their talking. He was wholly informal in dealing with production interference caused by employee conversations (Tr. 837–838). Here, contradicting Bembers' testimony, he allegedly recommended to Bembers a written warning against Noyes' talking because of a formal rule only against ''instructing'' (he did not hear the subject of the conversation) merely having observed her moving her lips in speaking to Weigen and Schmidt. Even here, he was totally unable to determine whether he himself recommended that a written warning be issued (Tr. 840–841) and why he departed from his prior informal practice and decided to recommend a written warning, a preliminary to discharge. An answer from the plant manager of ''I don't know'' in describing why, in this case, he recommended a written warning is entirely unsatisfactory when given in the presence of a prima facie case of Respondent's union animus and of Noyes being a known union activist. His testimony on these points was particularly evasive, incredible when observed and painful on reading (Tr. 838–842).

I conclude that Respondent, by Martin Bembers, and by its plant manager, Allen Schmitz, and by its supervisor, Gale Rosen, violated Section 8(a)(1) and (3) of the Act on June 15, 1988, by issuing a written warning to Tina Noyes as alleged.[24]

(7) The verbal warning to Susan Sander of July 21, 1988; paragraph 6(f)

On July 21, 1988, almost a month after the Board-conducted election, Bembers memorialized a verbal warning in Sander's file. The memorandum (G.C. Exh. 7) recites that Bembers saw Sander talking to an employee and asked her why she was talking and ''not working.'' Sander responded that the employee had asked her a question. Bembers answered that he had observed her spending a long time talking and told her that she could not ''afford another [written] warning because it would result in a week's suspension.'' The memorandum does not allege misconduct other than talking. Sander recalls that Bembers told her to ''watch herself'' because ''the next time'' she'd get a written warning. The record is clear that Bembers did not tell Sander that she was receiving a written warning.

In view of the above conclusion that Respondent was disparately enforcing a no-talking policy, which disparate treatment found its origin in unlawful discrimination against union activists, I conclude that this verbal warning constituted a violation of Section 8(a)(3) and (1) of the Act as alleged.

(8) The August 5, 1988 suspension of Susan Sander; paragraph 6(a)

Gerard Schreiner, employed by Respondent for 15 years, is the supervisor of three production lines, including the Pioneer line. Schreiner has been supervisor of these lines for 4 or 5 years. Among other things, the Pioneer line packages raw turkey breast meat using a film which seals the turkey meat in a container after first evacuating the air (Tr. 865–866). The quality control employee assigned to the Pioneer line was Susan Sander. On August 5, 1988, raw breast meat was being run through the Pioneer machine for future freezing (Tr. 867). The particular packaged raw turkey meat was called ''product 2180.''

On the morning of August 5, Schreiner saw Sander rejecting many 2180 units, causing them to be placed in a barrel for further reprocessing. She rejected them because of excess air in the product (Tr. 868). These rejections caused Schreiner to seek out the chief supervisor of quality control, Martin Bembers (Tr. 868). Apparently while Schreiner was looking for Bembers, Sander spoke to fellow quality control

[24] Weigen credibly testified that after Tina Noyes told him that she had received a written warning, he asked Plant Manager Schmitz whether he had told him that Noyes had been talking. Weigen testified that Plant Manager Schmitz' answer was ''no'' (Tr. 1324). Weigen then asked Schmitz: ''Well how come she's got a written warning for talking?'' (Tr. 1324); Schmitz ''couldn't answer it'' (Tr. 1325).

employee Tina Noyes. Sander called Noyes over to the line (Tr. 1353) because Noyes had worked on the Pioneer line longer than Sander, had more experience with product 2180 and the quality control standards to be applied to air in the packaging (Tr. 1353). When Noyes saw the 2180 packages, the air in the packaging was ''very noticeable'' and Noyes told Sander that the packaging appeared to be unacceptable but that she should ask Supervisor Rosen's decision on the matter (Tr. 1352). Sander went to the quality control kitchen and asked Rosen if they had changed the rules (Tr. 169) and if it was correct to package the turkey breast in ''pockets with holes in the bag'' (Tr. 170 [permitting air to enter the chamber]). Rosen said it was not permitted [''no, not that he was aware of''] (Tr. 169–170). Sander left Rosen, returned to the Pioneer line, and there found Schreiner and Bembers (Tr. 1077). There, Bembers and Schreiner had a 15-minute discussion with Sander. Schreiner previously told Bembers that excessive product 2180 was being rejected, would have to be reworked (Tr. 1196) and that Bembers should go out to the line and take a look.

Bembers saw that there was a lot of air in the bags. Bembers explained to Sander that air in a *cooked product* was a cause for concern but that air bubbles in raw products were not a reason for rejection (Tr. 1197). He then told her that these 2180 packages would be acceptable but that she should be aware of other categories of defects (Tr. 1197).

After Bembers told Supervisor Schreiner to continue to ''rack'' the 2180 product (Tr. 869), Schreiner so instructed the rackers (Tr. 871) and they started running the product line again. Sander, at this time, was talking to Pioneer line Assistant Supervisor Warren Benton who told Sander that she would just have to ''understand'' (Tr. 872). At this point, Sander said that ''she didn't give a f— what it looked like before it went through the machine and didn't give a f— what it looked like after it came out'' (Tr. 872).[25] Although Sander admits that she said: ''I don't f— care'' (Tr. 172, 176), she denies ever having said that she didn't care about the quality of product 2180 (Tr. 178). She admits that on other occasions during the union campaign, she might have said that she didn't care about the Company's product (Tr. 179). In any case, Supervisor Schreiner never heard *her* say this (Tr. 906–907), but he heard *other* employees say this (Tr. 901) and never reported such employees for having expressed disregard for the quality or safety of Respondent's product (Tr. 901) nor did not ever report such a statement to the employees' supervisors, particularly to Supervisor Bembers (Tr. 901).

What annoyed Sander was her understanding that, previously, quality control employees never permitted product containing air to pass without check and she resented the absence of any ''set standards.'' She perceived that standards were permitted to change at the apparent convenience of Respondent (Tr. 176–177).

Schreiner testified that he understood that the object of Sander's comment was that she didn't care about the Company's product (Tr. 873). He told her that she was displaying a poor attitude in saying that she didn't ''give a f—'' (Tr. 874). In response, he said Sander repeated the explitive. When she made this remark, Supervisor Schreiner looked for Gale Rosen and, failing to find him, sought out Director Bembers (Tr. 875). Schreiner testified that the reason he sought out Bembers was to report this remark because Sander, in quality control, had said that she didn't care what the product looked like (Tr. 875). Bembers then told Schreiner to document what he heard and Schreiner did so (Tr. 876; R. Exh. 5).[26]

Within an hour, Schreiner typed up and signed the memorialized Sander comment (Tr. 878) and sent it, not to Bembers, but to Respondent's director of personnel, Jim Glynn (Tr. 879).[27]

About a half hour later, a meeting took place in the quality control meeting room. Present were Bembers, Rosen, Sander, and Glynn (Tr. 950). But prior to the meeting, Bembers had directed the office clerical to prepare a written warning notice against Sander which would state that Sander was being disciplined by a 5-day suspension. Bembers told the clerical to specify only that the reason for this second written warning to Sander would be her ''failing to do the job properly.'' Bembers testified that he mentioned nothing else to be placed on the written notice (Tr. 1198). After the start of the meeting, however, Glynn, in his own handwriting, added after the already transcribed ''failing to do the job properly,'' the words ''and expressing she didn't care about the quality of product 2180'' (Tr. 951; G.C. Exh. 8). Bembers denied that Sander explained her being upset was because the air bubbles caused her to believe the product was defective (Tr. 1205). Glynn told Sander that the quality assurance employees were Respondent's ''last line of defense'' and Sander's attitude about the quality of the product caused Respondent to be ''in big trouble'' (Tr. 953). When Sander apologized, Glynn told her that an apology was not enough and that he would have to deal with her ''rather severely'' (Tr. 953). It was then that he said that he felt that a 5-day suspension was in order for this type of attitude (Tr. 553). At this time, it was about 9:30 in the morning and he told her that 5 days henceforth would be August 12 and told her to return to work at 9:30 a.m. on August 12 (Tr. 954).

Although Glynn testified that it was his decision to suspend Sander (Tr. 954), Bembers testified that since he had directed that this be a second written warning, it followed that Sanders would be suspended for 5 days (Tr. 1198). When he notified Glynn of the matter, Bembers testified that he consulted the director of personnel in order to make sure that his decision was the ''correct action to be taken'' (Tr. 799). He ultimately testified that the ''final decision'' was made by Glynn during the meeting (Tr. 1199) notwithstanding that the second warning notice, at his direction, already contained the direction that there be a 5-day suspension (G.C. Exh. 8). Thereafter, Sander was suspended for 5 days

[25] In view of the fact that employees, and indeed, supervisors, at all material times, sometimes used profanity without discipline, Respondent has foresworn the use of profanity as the reason for Sander being disciplined by suspension in this matter (R. Br. 9).

[26] General Cousnel's witnesses (Sander, Hedtke, and Noyes) testified that, in the past, air in the 2180 product had been a basis for rejecting the product. Supervisor Schreiner's own testimony was unclear and unreliable (compare Tr. 895 with Tr. 896) on whether air in the pockets of product 2180 was cause for rejection (''could have been'') and in the past, had caused rejection (''probably not''). He then testified that it had not been a cause for rejection (''no'').

[27] Schreiner gave it to Glynn rather than to Bembers because when Schreiner originally reported Sander's statement to Bembers, Bembers informed Glynn (Tr. 948). Glynn told Bembers that before Glynn preceded any further in the matter, he wanted to see the language in black and white. He directed Bembers to have Schreiner memorialize it (Tr. 950).

without pay (Tr. 180). Sander testified without contradiction that she had heard other employees, including quality control employees, say that they didn't ''care'' in the plant, indeed in the presence of supervisors, and they were never punished for it. She testified that she heard a supervisor say the same thing (Tr. 181).

Although Bembers testified that Sander merely attempted to apologize for her statements and did not attempt to explain to the supervisors that her language was based upon her observation of a product process which she thought would rebound against Respondent if the product was permitted to leave the plant (Tr. 1205); and although Glynn testified that Sander did not challenge or contest the accusations that were made against her (Tr. 963), Sander testified that she told them that her statement did not mean that she didn't care about the product but that she had gotten ''fed up'' with changes in the rules with regard to ''doing the 2180s'' and that there were no ''set rules'' (Tr. 183). While Glynn's testimony does not specifically deny that Sander raised the question of the lack of consistency in applying the rules, Bembers' testimony constitutes, in my judgment, a particular denial that Sander raised the subject. Based upon my observation and evaluation of the Bembers' and the record considered as a whole, I would credit Sander and discredit Bembers' denial. I conclude, therefore, that Sanders did raise the question of her unhappiness with the alleged or apparent inconsistency of the application of rules concerning air bubbles in the 2180 product.

(9) Discussion and conclusions; suspension of Susan Sander

I will accept, arguendo, Glynn's testimony that he decided to suspend Sander for 5 days without regard to her history of a prior written warning. I might ordinarily further accept his testimony that the suspension was not the result of automatic discipline based upon the second written warning notwithstanding that Bembers had not only written the notation ''2nd'' at the top of the written warning, but had already established that a 5-day suspension was the punishment for a second written warning. I shall further assume that an employee's outburst, even after her consultation with a knowledgeable coemployee and her supervisor, that she didn't give a ''f—'' about the appearance of the product, is a serious matter and would be the subject for discipline. On the other hand, one reaches the problem of the 5-day suspension encumbered by the baggage of a strong, unrebutted prima facie case of Respondent's hostility to the union activities of employees, like Sander, whom it knew to be a union supporter, together with unlawful actions against these employees and incredible, sometimes unintelligible explanations for these actions.

In the presence of this prima facie case and Respondent witnesses' unreliable evidence, there is Supervisor Schreiner's dispositive testimony that, on other occasions he heard other employees casually speak ill against the Company's product but never reported them or wrote them up (Tr. 900–901). Schreiner testified that, after hearing Sander's outburst, he reported this outburst to Bembers because, if one of his employees had talked to him like that he would probably have written them up (Tr. 900). The obvious problem is that Schreiner did not report on or write up the employees he heard casually bad-mouth the job or the Respondent's products. He said that he might have done so if they were under his supervision. But Sander was not under his supervision.

In addition, there is the question of why Bembers, a high-level supervisor, dealing with a disciplinary problem wholly within his own sphere of authority, should find it necessary to consult with Glynn, personnel director of 1000–2000 employees, over an employee warning (Tr. 960).[28] The further question is why within a half hour after receiving Bembers' report to him, Glynn would direct Bembers to have the matter memorialized by Schreiner (Tr. 960) before *he* (Glynn) ''proceeded any further'' (Tr. 960). This, followed by the further problem of why Bembers and Glynn held a meeting within a half hour or 40 minutes after Bembers first notified Glynn of what Schreiner had told him and even before Schreiner had the matter memorialized (Tr. 950).[29] The answer to these questions is that if members was going to give the appearance of lawful discipline, he wanted the director of personnel to become involved—to ensure plausibility.

But the crucial problem is Respondent's confusion as to why Sander should be punished.[30] On this question, it seems to me that, well before he consulted Glynn, Bembers had already decided that she should be punished by a written warning notice of his own creation; and that it be classified as a second written warning notice, requiring punishment beyond mere admonition. As Bembers testified, he told Sander that this was her ''second written warning.'' She already had one written warning. (Tr. 1198.) In response to the question whether a second written warning meant that she would be suspended for 5 days, Bembers testified: ''That is correct'' (Tr. 1198). Bembers' further testimony that the decision to suspend Sander was not his but Glynn's seems false. Glynn's testimony that it was his decision to discipline Sander is also untrue: Glynn merely supplied an alternative rationale for punishment already determined.

Glynn's presence on such short notice, with his prior direction of memorialization, all within the space of less than an hour leads to the conclusion that Respondent desired to deal with Sander in the promptest terms. Bembers' decision to suspend her because of certain, specific conduct had already been made. That Bembers desired to touch base with Glynn is relevant only because Glynn supplied a further, dif-

[28] As will be seen hereafter in the text, there was an incident 3 months before this August 5, 1988 suspension which brought Sander's emphatic union sympathies to the direct attention of corporate-level supervisors. In April 1988 she was brought to Vice President Jeffords in order to obtain the return of her union pen which Supervisor Rosen had taken.

[29] Glynn originally testified that it took 30 to 40 minutes for him to convene the meeting with Sander and the other supervisors from the time that he first became aware of the Sander's problem from Bembers (Tr. 950). When, in General Counsel's cross-examination of Glynn, General Counsel began to emphasize the remarkable urgency with which Glynn acted against Sander, Glynn not only admitted that it was *uncommon* haste for him to have caused the Schreiner memo to have been memorialized, and to thereafter convene an immediate supervisors' meeting, all within a half-hour to 40 minutes (Tr. 960); but, changing his testimony, he stretched the events into ''about an hour's time'' (Tr. 962–963). Such a change during cross-examination demonstrates Glynn's recognition of the irregularity of his and his supervisors' conduct and a classical compensating ''bending'' of his direct examination testimony that is unsatisfactory for credibility purposes. I conclude that Glynn, fully aware that Respondent acted with inexplicable dexterity in disciplining Sander, sought to escape from any adverse inference flowing from that speed. I am constrained to find that he failed.

[30] Supervisor Schreiner never reported employees whom he heard speak against Respondent or its products.

ferent rationale for discipline, a rationale distinct from Bembers' original ''failing to do the job properly.''

Lastly, there is the problem raised by the fact that Bembers had predicted, within a prior period of 2 weeks, that Sander could not afford a further written notice because it would call for her being suspended.

I am persuaded that, in the presence of General Counsel's prima facie case of discrimination against Sander, in particular, Respondent has neither rebutted the prima facie case of continued discrimination against her, nor has it supported its burden, *Wright Line*, 251 NLRB 1083 (1980); *NKC of America*, 291 NLRB 683 fn. 4 (1988), to establish that Sander's outburst, regardless of the prima facie case, would have caused Respondent to punish and discipline Sander. *Klate Holt Co*., 161 NLRB 1606, 1612 (1966). On the contrary, Respondent's use of Sander's outburst as a vehicle for punishment demonstrates that it was a mere pretext upon which its supervisors were acting.

The presence of Glynn's additional rationale ''she didn't care about the quality of the product'' to Bembers' original (''failing to do the job properly'') reveals the pretextual nature of the punishment and supports the inference of discriminatory motive. It also directly subverts the credibility of Glynn and Bembers.

If Bembers had already decided on a 5-day suspenslon after Bembers heard Schreiner's report of Sander's profane indifference to the quality of product 2180, then it was Sander's apparently unnecessary and improper *interference with production* (''failing to do the job properly'') that prompted Bembers' decision to suspend her. Nothing that Bembers wrote referred to Sander's contempt for the quality of the product. That was solely Glynn's rationale and *that* was the basis on which he decided that ''a suspension was appropriate'' (Tr. 954). Bembers' basis for suspending Sander, according to Glynn's testimony (Tr. 953–954) clearly played no part in the suspension. But Bembers' decision to suspend together with the supporting rationale had already been recorded (Tr. 951; G.C. Exh. 8). Thus, a further, entirely different, rationale was supplied by Glynn after he saw Schreiner's memorandum. There is not the slightest reference, in Glynn's testimony (Tr. 953–954) to the basis on which Bembers had already decided to suspend Sander for 5 days (G.C. Exh. 8). Glynn's recognition of a different and ''better'' basis on which to explain the suspension after the basis had already been recorded by the chief supervisor who ordered the suspension (Tr. 1198), requires the conclusion that Respondent has supplied shifting reasons for the discipline, abandoning ''failure to do the job'' in favor of Glynn's rationale. This leads to the inference that Glynn found Bembers' explanation for this admittedly hurried action to be inadequate and that Glynn desired to supply a stronger basis in order to conceal a different motive. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966). While Respondent's proffered shifting reasons are not demonstrably ''false,'' they are the very basis for a finding of ''pretext.''

The finding of pretext is based on the further fact that Schreiner had heard other employees, from time-to-time, make casual disparaging remarks against Respondent's product and had never reported them. He never reported them because they were not under his supervision. But Sander, a quality control employee, was not under his supervision. His conduct was unique. Here, with evident disparate treatment, he seemed to race to report this ''misconduct'' to Bembers who thereafter reported it to Glynn and they convened a meeting in which to discipline Sander. Contrary to Respondent's testimony, I conclude that prior to the meeting, Bembers, the chief supervisor over multiplant quality control, had already decided that she would be suspended, and that he sought Glynn merely for corroboration and, for reasons not apparent, corporate-level support. Furthermore, I conclude that contrary to Glynn's and Bembers' testimony, Respondent had already created a ''paper trail'' of unlawful verbal and written warnings against Sander to support this suspension as merely a further, normal disciplinary act. Paper trails are not unknown as retaliatory devices against union activists. See *Davis Electrical Constructors*, 291 NLRB 115 (1988); *Quebecor Group*, 258 NLRB 961, 972 (1981).

I also regard the composition and hasty convening of the disciplinary group (Rosen, Glynn, and Bembers) to issue a warning and suspension because of an employee's profane denunciation of a Respondent's procedure and the alacrity with which it acted, as unique, as Glynn admitted. I was moreover impressed by Glynn's testimony both that no employee in his experience had ever been suspended for disparaging a Respondent product and his willingness to bend later testimony away from prior damaging testimony. I was not impressed by his assertion that Sander did not attempt to explain her conduct at the meeting. Taken together with the strength of the prima facie case, including prior unlawful actions against Sander, and Respondent's shifting reasons for the suspension, I cannot conclude that Respondent, by a preponderance of the credible evidence, has established that it would have taken the action of suspending Sander regardless of her protected activity. *NLRB v. Transportation Management Corp*., 462 U.S. 393, 400–401 (1983); *NKC of America*, supra.[31]

D. *Alleged Violations of Section 8(a)(1) of the Act*

1. Confiscation of a union pen by Gale Rosen alleged as a violation of Section 8(a)(1) of the Act

Sometime after April 1988 (Sander could not recall whether this event occurred before or after the April 14, 1988 petition for certification was filed (Tr. 189)), Sander was on the production floor writing on her clipboard with a red and white union pen. Assistant Plant Manager Dan Nelson approached her and asked if he could see the pen. She gave it to him, he looked at it and returned it to her. A little while later she was in the quality control kitchen with Supervisor Gale Rosen. He asked her if she had a red and white ''pencil'' and she said that she did not have a pencil but had a pen. Rosen asked to see it and she gave it to him and he walked out of the area. In a little while, Rosen returned with a Jennie-O pen. He gave it to Sander but Sander asked him

[31] A 5-day suspension, in any event, seems to be oddly and disparately harsh. Respondent merely gave second written warnings to employees involved in failing to do their job properly. They were not suspended though guilty of two offenses related to the same conduct. Thus an insubordinate employee, who received a written warning, received merely a second written warning for engaging in further insubordination involving horseplay creating a safety hazzard (G.C. Exhs. 18 and 19). Respondent displayed apparent leniency in issuing successive written warnings, without suspension, in other cases of insubordination and unsanitary work practices (see G.C. Exhs. 20, 21, 22, 23).

what he had done with her pen. He said he had given it to Vice President Jeffords because Jeffords collects pens (Tr. 191). A short time thereafter, Sander asked Rosen for the return of her pen. He took her up to Jefford's office and she asked Jeffords for the return of the pen (Tr. 192). He asked her if he could have the Jennie-O pen returned and when Sander said that she would return it, they exchanged pens and Sander left. Sander testified that she had never been in Vice President Jefford's office before. She also testified that on this same day, Supervisor Rosen told her not to use the union pen again (Tr. 193). She did not use it thereafter.

Although Supervisor Rosen was called only as an adverse witness by General Counsel, he never testified on this point.

Assistant Plant Manager Dan Nelson, however, did testify on this issue. In particular, he testified that it occurred about 2 weeks before the June 24, 1988 Board-conducted election (Tr. 928). He testified that when Sander ''displayed'' that she had received a pen and other ''paraphernalia'' (Tr. 928) from the Union, Nelson asked to see it. She said ''no problem'' and handed him the pen. He then testified that he asked if he could keep the pen and she said ''no problem. I can get as many as I would like.'' Nelson testified that he kept the pen (Tr. 928). He also testified that thereafter he gave the pen to Vice President Jeffords because he collects pens and that he told this to Sander when she gave him the pen (Tr. 928–929). He testified that Rosen was not present at the time that she gave him the pen (Tr. 929). He further testified that about a half hour after she gave him the pen, she said to him: ''I can't believe you'd want a union pen'' (Tr. 930).

Discussion and Conclusions

Respondent takes the position that the evidence in support of the allegation does not make out a violation (R. Br. 16) and asserts that the conflict of testimony between Sander and Assistant Plant Manager Dan Nelson need therefore not be resolved. In particular, Respondent asserts that because there is no testimony that any supervisor forceably took the pen from her or that she was unable to get it back immediately on request, the evidence fails to make out a legal violation (R. Br. 16).

In view of Respondent's unexplained failure to call or examine Supervisor Rosen to deny Sander's testimony that it was Rosen who asked if she had the pen; that it was Rosen who took the pen from her and handed her a Jennie-O pen; and that it was Rosen who told her that he had given it to Vice President John Jeffords because he collects pens, I credit Sander's version and do not credit Nelson that it was Nelson who engaged in any part of this activity. I further find, on the basis of Sander's uncontradicted and otherwise credible testimony that Rosen, on the same day, told her, after returning the pen to her, that she should not use the pen again.

At the hearing I expressed some doubt as to the overall seriousness of the alleged act of unlawful interference with Sander's Section 7 rights in the above conduct by Supervisor Rosen even crediting Sander's version of the events (Tr. 193). Compare: *Associacion Hospital del Maestro*, 283 NLRB 419 (1987). The use of the word ''confiscation'' in General Counsel's pleading (complaint par. 5(b)) seems to me to be inaccurate since the pen was removed from her possession with her consent and returned by Vice President Jeffords upon her request (Tr. 193).

I have discovered, however, that the Board and courts take a much more serious view of what Respondent (and I) evidently believed was a minor, a de minimis, even a playful incident: a supervisor, though he did not intend to return the pen, took it from an employee without threat or other intimidation, presented it to a high company official who apparently collects pens and who thereafter returned it at the employee's request. In *NLRB v. Intertherm, Inc*., 596 F.2d 267, 272–273 (8th Cir. 1979), a supervisor covered over an employee's pocket protector, bearing a union logo, with a small sticker bearing the company logo. The employees spent the remainder of the day wearing the company sticker. The company argued that there was no unfair labor practice because the supervisor's actions were part of a running joke between the supervisor and the employee and therefore were not coercive. The supervisor said he was only joking and that the employee had been free to remove the company sticker at any time. The employee admitted that there was laughter in the conversation before the incident occurred but thought that he was required to keep the union logo covered with the company logo. The court noted that the administrative law judge credited the employee's testimony that the affair was no joking matter and found the violation with the Board thereafter agreeing. The court, with misgiving, refused to reject the administrative law judge's determination and held that he drew a reasonable inference of coercion which was warranted by the evidence. Whatever the court's reticence, I am bound by the Board's position.

While I might ordinarily hesitate to find a violation even under these circumstances, I cannot escape the undenied and credited further evidence that Supervisor Rosen admonished Sander not to use the union pen again after he returned it. Whether Rosen could lawfully bar the union label pen from being displayed and *used* for work purposes is not the issue. His action was no joke; this is not playfulness. Sander did not use the union pen again (Tr. 193). I am constrained to conclude, therefore, that Respondent's conduct was sufficiently coercive as to constitute a violation of Section 8(a)(1) of the Act in taking, returning, and admonishing Sander with regard to the use of the union pen. Whether or not Respondent confiscated the pen, Sander has a right to possess and display union insignia on the job absent special circumstances. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 802 fn. 7 (1945) (interference with production, safety, or discipline). Rosen forbade ''use'' of the pen but failed to say that it could be actually used in the plant in nonwork areas and nonworktime and displayed at all other times and places. *Associacion Hospital del Maestro v. NLRB*, 842 F.2d 575 (1st Cir. 1988).

On the basis of Sanders' testimony, in addition, I would have concluded that her placing the incident as ''sometime in April'' was insufficient to identify the date to bring it within the *Ideal Electric* period, i.e., after the April 14, 1988 filing of the petition. Thus I was prepared to conclude, notwithstanding that Respondent's conduct constituted a violation of Section 8(a)(1) of the Act, that such conduct could not be considered as evidence in support of setting aside the election as objectionable conduct. In view, however, of Supervisor Nelson's testimony that the incident occurred about 2 weeks before the June 24 election rather than in a generalized period ''sometime in April'' 1988, I further conclude that this incident may be considered in weighing whether Re-

spondent's unfair labor practices are sufficient to set aside the June 24 election. In view of Nelson's testimony, I conclude that this conduct may be so considered.

2. Supervisor Rosen allegedly promises that conditions will improve after the election, constituting a promise of benefit and objectionable conduct

Apparently between May 2 and the June 24 election, quality control employees Noyes and Sander spoke to each other on breaktime on the staircase while coming into the quality control kitchen. In direct examination (Tr. 152–153), Sander testified that they said that it was ''sick'' that quality control employees were forbidden to talk to production employees on the production line (Tr. 153). She further testified that Supervisor Rosen overheard them and said: ''Things will change after the 24th [the June 24 election]'' (Tr. 152).

On cross-examination, after being shown her pretrial affidavit which recorded that Supervisor Rosen could have said: ''That will change after the 24th or it will change soon'' (Tr. 214), Sanders said (Tr. 218) that she did not care to change her testimony as reflected in the pretrial statement but stated that she could not recall whether Rosen had used the further expression, ''or soon'' (Tr. 218).

Neither Tina Noyes nor Rosen testified in this proceeding on this point.

Discussion and Conclusions

Contrary to Respondent's argument (Br. 18) I will assume, arguendo, that Rosen heard the Noyes-Sander conversation which related to their objection to the rule preventing them from speaking to production employees on the line. If Rosen had said, as Sander had testified in her direct examination, that things will improve after the June 24 election, it could be, as General Counsel argues, a promise of a benefit of a change in Respondent's rigorous ''no-talking'' rule after the election. In fact, General Counsel points out, the rule was relaxed after the election and there was no contradictory evidence that it was not relaxed (Engwal, Tr. 404). The crucial question, however, is what Rosen actually said to Noyes and Sander.

Since Noyes did not testify on the point, there can be no corroboration for Sander's insistence that he used the June 24 date. On the other hand, she swore to a statement which creates an ambiguity: did Supervisor Rosen say that the rigorous no-talking rule would be relaxed after the June 24 election or ''soon.'' If he merely said ''soon,'' there would be no defined peg on which to hang General Counsel's argument that it was conditional upon the occurrence of the election. In view of the sworn statement, I agree with Respondent's argument that Sander's testimony on the point is rendered too ambiguous on which to carry the General Counsel's burden to prove the existence of an unfair labor practice by a preponderance of the credible evidence. On this ground, alone, I will recommend to the Board that the allegations of paragraph 5(I) of the complaint be dismissed.[32]

[32] It is unnecessary, therefore, to decide whether even if Rosen mentioned only June 24 as the date for relaxing the rule, his statement would be unlawful.

3. Paragraph 5(j) of the complaint; objectionable conduct; harassment of an employee and prohibition against wearing union insignia on nonworking time in a nonwork area

Engaged in food production, Respondent, under Federal rule, prohibits its employees from wearing jewelry, buttons, or other paraphernalia in the production area. The rule also requires that quality control employees wear hardhats in the production area. There is no Respondent prohibition against wearing union identification or wearing nonhardhats in nonproduction areas. Other employees were permitted to wear soft hats, including union insignia soft hats, in production areas. The reason that the quality control employees had to wear their blue hardhats was that they could be identified (Tr. 225).

Sometime in April 1988,[33] as Sander descended the staircase from the upstairs lunchroom toward the work floor, she was wearing a soft Jennie-O hat with a union ''vote yes'' button on it. She had been wearing the hat in the lunchroom. Supervisor Al Schmitz asked her whether she knew about it, and continued downstairs to the hallway in front of the doors that led to the production floor (Tr. 197). This was on Sander's breaktime and the hallway space leading to the production floor is a nonwork area. In the hallway across from the plant manger's office and near the production area floor doors, Supervisor Richard Van Ort opened the plant manager's door and said, in a loud voice (Tr. 202): ''Look at her. Look at her.'' Fifty feet down the hall, Supervisor Gale Rosen yelled to her: ''Sue, get in here!'' She walked down the hall and entered his office. He told her: ''You've got to take off your hat.'' Sander responded: ''I know my break is just about over anyway.'' She took off the hat and went to work (Tr. 200–201).

Plant Manager Schmitz testified that he recalled the incident but that it was 3 or 4 months before the election. He said that Sander was approaching his office and had a hat with a button on it. He could not recall what the hat said but he recalled that it was a union button that she had on the hat. He told her that she would not be allowed ''to wear that in the plant.'' He testified that he had ''zeroed in on'' the button.

Discussion and Conclusions

1. Schmitz was not concerned with the hat that Sander was wearing; he was looking at the button and saw that it was a union button. He told her that she was not allowed to wear ''that'' in the plant. While I'm willing to conclude that he was refering to the button, as General Counsel argues, I infer, from the surrounding circumstances, despite his broad and imprecise statement, that he was using the phrase ''in the plant'' to mean in the production area rather than an indeterminate place in the plant as a whole. Therefore Schmitz was reminding Sander of the rule that she could not wear the union button, or any other button, in the production area. Respondent's rule applies to all buttons, earrings, and similar paraphernalia, and there is nothing in Schmitz' admonition, thus construed, which is unlawful within the meaning of Section 8(a)(1).

[33] Sander could not testify whether this incident, though it occurred in April 1988, occurred before or after the Union's petition was filed (Tr. 196).

2. What Van Ort yelled to Sander (''Look at her, Look at her.'') was, as General Counsel argues, in my judgment, motivated by union animus because he too was looking at the button on the hat, and he was, to that extent harassing Sander. Further, as General Counsel argues, I conclude that Van Ort may well have been motivated by union animus because of Respondent's identification of Sander as a union supporter. It is true that neither Rosen nor Van Ort testified. However, standing alone, Van Ort's derisive statement, ''Look at her. Look at her,'' is nothing more than derision from a supervisor concerning the wearing of a union button which Sander was permitted to wear on her breaktime in a nonwork area. It seems to me that mere derision directed to a known, open supporter of the union is protected by Section 8(c) of the Act and is neither a threat nor sufficient interference with Sander's protected activities as to constitute such an invasion thereof as to be a violation of Section 8(a)(1) of the Act.

3. A closer question may be presented by Rosen's statement to Sander. Again, Rosen did not testify to explain. On Sander's testimony however, all that Rosen told her was, in a loud voice from 50 feet away, to get into his office plus the statement: ''You've got to take off your hat.'' There is no reference to the button in Rosen's statement and his admonition that she had to remove the hat seems to me consistent with what Schmitz had earlier told her: ''That,'' the hat with the union button on it, could not be worn in the production area.

There is no evidence that Respondent sought to have Sander remove the union button from her hat in a nonwork area on breaktime. All the evidence suggests that Supervisors Rosen and Schmitz were telling her to take the hat off, with the union button, before she entered the production floor. They were not telling her that she could not wear the hat with the button on it during her breaktime. Sander, herself, acknowledged the rule and her right to wear insignia on breaktime in nonwork areas when she told Rosen that she knew her break was over (Tr. 200–201).

General Counsel's ultimate argument is that Van Ort was unlawfully harassing Sander by yelling at her derisively about her wearing the hat with the button on it. I conclude that such harassment is conduct which is not violative of the Act. I therefore recommend to the Board that paragraph 5(j) of the complaint be dismissed.

4. Martin Bember's threat to reevaluate quality control employee jobs after the election; complaint paragraph 5(n) and objectionable conduct

Bembers testified that a week before the election, around June 17, in the blending area, he saw quality control employees Tina Noyes and Susan Sander talking to each other. He watched them and started timing them because they were ''visiting'' (Tr. 1206). He concluded that their talking together for in excess of 5 minutes was not the result of their taking care of a company problem. This, he said, was ''visitation on the line'' (Tr. 1206). He concluded this to be true because Susan Sander was out of her assigned work area and therefore, he concluded, was not doing her job (Tr. 1206).

In any event, he said that when he approached and spoke to them, they feigned inspecting a thermometer. He asked Sander what she was doing and Sander allegedly did not answer him. He then said he told Sander that she was out of her area and at that point Noyes left. Bembers testified that Sander told him that she had ''nothing to do so she went over there into the blending area'' (Tr. 1207). He also testified that Sander told him that she had ''nothing to do so I came over here to talk'' (Tr. 1207). Noyes testified that she and Sander were double checking temperature readings on their meat thermometers, a common practice which had been going on for at least 3-1/2 years.

Later, Bembers asked Noyes to come into the lab because he wanted to talk to her (Tr. 1208) in the presence of Supervisor Rosen. Bembers said that he told her that she had been visiting on the line and that Noyes did not deny it but asked for a witness which Bembers refused. When Noyes allegedly then asked Bembers whether she was doing her job, Bembers told her that she was not (Tr. 1208) and then added: ''If you don't have enough work to do; that you find all that time visiting . . . we are going to have to re-evaluate the job load of everybody after the election, June 24, because it is obvious that some people have time to visit and other people don't'' (Tr. 1208–1209). He testified that he specified the election date of June 24 because he had been told that he couldn't change ''job positions'' prior to that time. He couldn't remember who told him or where it appeared (Tr. 1209). He also testified that he didn't fire these malingering employees because he had been told not to fire them (Tr. 1209).

Discussion and Conclusions

As above-noted, Bembers was timing the conversation between Noyes and Sanders. It cannot be said that they were violating any rule concerning instructing production employees because they were talking to each other and not to production employees. It is also clear that they were not violating the newly implemented no-talking rule because again, they were not talking to employees but were talking to each other. Noyes testified that they were comparing thermometers. In substance, Bembers testified that they were not doing their jobs and were just talking to each other, wasting Respondent's time. I conclude, from an analysis of the record considered as a whole, that Bembers was keeping a special eye on Noyes and Sander because he knew, as all Respondent's supervisors knew, that these two quality control employees were prominent union supporters. It appears to me that he suspected that they might be discussing union activities on company time rather than doing something else. I do not have to reach the question of whether Respondent could lawfully discipline employees for talking of union activities during worktime in a work area because Respondent was not enforcing any such rule against employees other than quality control employees whom it suspected of being union advocates. The rule in fact, was not a no-talking rule but a rule enforced solely against quality control employees suspected of talking about the union on company time. Not all quality control employees were actually subject to the rule. Moreover, when production employees spoke on the line, thereby not paying attention to Respondent's work doing worktime, they were not subject to the rule or disciplined. The plant manager merely approached them to cause them to return to work. There was no further action, much less discipline (Tr. 837–838). It was only the suspicion of quality control employees, known to be union supporters, engaging in union activities that caused Respondent's supervisors, in general,

and Bembers, in particular, to pay attention and to make threats of reevaluating jobs after the election.

The Board has found an administrative law judge to have committed prejudicial error in failing to find that an employer's selective enforcement of a no-solicitation rule against union activities, simultaneously failing to enforce such a rule against other types of solicitation, violated Section 8(a)(1) of the Act. *Polynesian Hospitality Tours*, 297 NLRB 228 at fn. 2 (1989). Similarly, Respondent cannot selectively enforce a rule against certain quality control employees and not against other quality control employees or other employees for engaging in allegedly disruptive nonwork activities on worktime, because it suspects the quality control employees of engaging in union activities. I therefore conclude that Bembers' selective enforcement of a rule preventing quality control employees Noyes and Sander from ''visiting'' with each other, is a selective enforcement of the ''no visiting'' rule. When this selective enforcement is coupled with Bembers' threat to reevaluate Noyes and Sander quality control jobs because of alleged redundency, this constituted a threat of discharge. Such a threat, consistent with the allegations in paragraph 5(n) in the complaint, violates Section 8(a)(1) of the Act. I need not resolve the question whether the employees were actually comparing their thermometers.

5. Supervisor Rosen requests employees to sit separately, conduct allegedly in violation of Section 8(a)(1) of the Act (par. 5(r) and objectionable conduct)

On June 20, 4 days before the election, Respondent held one of its ''captive audience'' meetings of its 500 plant 4 employees in the lunchroom. At these meetings, Respondent voiced sentiments which included prognostication of adverse consequences to the employees' best interests if they should select the Union as their collective-bargaining representative (Tr. 271; 400–401). Employee breaktime, for some of the employees, was delayed because of this ''captive audience'' meeting. As this meeting concluded, quality control employees Porter, Sander, Noyes, and Farkas sat down together, taking their break. This was approximately 1:45 p.m.

Supervisor Rosen approached them and asked them to ''split up.'' The employees protested that they were on their breaktime because their ''breaks'' had been delayed because of the ''captive audience'' speech (Tr. 271). Rosen then clarified what he meant by splitting their breaks: ''I mean can you sit at different tables, two here and two there,'' while pointing at different tables.

Tina Noyes then asked Rosen if he was ''crazy'' (Tr. 272) and Farkas asked him if he were ''kidding'' (Tr. 272; 101). Farkas added that it was ''really unfair of you to ask'' (Tr. 101). While Farkas recalled that at that point, Rosen merely walked away (Tr. 101), Noyes testified that five or six production employees sitting nearby yelled out: ''Yeah, you got to separate the sheep before they multiply'' (Tr. 272), and Supervisor Rosen, looking over to the table where the production employees were sitting, said: ''I was just asking. I was just asking'' (Tr. 272). Sander testified that there were 10 or 15 employees sitting at tables within a few feet of the four quality control employees when the conversation occurred (Tr. 203).

Respondent argues that since Supervisor Rosen's request was free of ''any compulsion, real or implied'' (R. Br. 22), it was free from coercion within the meaning of Section 8(a)(1) of the Act.

General Counsel appears to take the position that Respondent was attempting to isolate these union supporters from other employees (G.C. Br. 47). Since Supervisor Rosen was not called to testify, his motives could not be adequately determined, particularly whether he was enforcing his superior's (Bembers') no-talking rule in the break area on breaktime.

From the evidence of record, it is unnecessary to determine whether, as General Counsel argues, Respondent was attempting to separate known union supporters from other employees in the lunchroom in order to discourage their ability, 4 days before the election, to attract further union suport by their presence or by their solicitation on nonworktime in a nonwork area. It is sufficient that Supervisor Rosen, without explanation, was trying to separate the four employees whom he knew (and previously threatened) to be union supporters. This activity, alone, prevented them from engaging in the mutual support and protection which the act specifically permits them to engage in. Thus it is enough that Rosen was attempting to prevent the four of them from speaking to each other. In a nonwork place, on breaktime, Rosen's ''suggestion'' was a sufficient interference to violate Section 8(a)(1) of the Act.

As General Counsel points out, it is unnecessary to find that Rosen's ''suggestion'' that the four union supporters separate was successful. Equally unavailing as a defense is that the employees did not comply and that there was no ''compulsion.'' Had there been ''compulsion,'' the 8(a)(1) violation would have been even more pressing. Whether Supervisor Rosen's objective was to isolate union supporters from other employees or from each other, the statutory violation is made out. For it has long been settled that the test for interference, restraint, and coercion within the meaning of Section 8(a)(1) of the Act does not depend on the success of the coercion or, indeed, even upon the employer's motive. Rather the illegality is determined by whether the conduct may reasonably be said to have a tendency to interfere with the free exercise of employee rights under the Act. *El Rancho Market*, 235 NLRB 568, 471 (1978). That the employees refused to separate at Rosen's ''request'' is irrelevant under this rule as is Rosen's motive in gaining his objective, whether it was to isolate the employees from each other or to isolate these four union employees from other employees sitting nearby.

6. Paragraph 5(n): Respondent allegedly isolates quality control employee Farkas because of her union activities, violating Section 8(a)(1) of the Act: objectionable conduct

At about 1:30 p.m. on June 24, 1988, election day, employees, for whom employee Farkas was the quality controller, were voting or coming to vote, in the lunchroom. Another part of the lunchroom was being used for breaks for employees who were on breaktime. Sarah Farkas was in the lunchroom on breaktime (Tr. 103). She was on breaktime because the employees for whom she performed quality controlling were not at work but on their way to vote (Tr. 1210). Downstairs, Supervisor Martin Bembers and Supervisor Gale Rosen were in the quality control kitchen which Rosen appparently used as an office. At Bembers' direction (Tr.

1213), Rosen telephoned Farkas up in the lunchroom. Rosen asked her if she was still on her break. When she told him that she had come up late on her break and was still on breaktime (Rosen had seen her go up for her breaktime, Tr. 104), Rosen told her to come down to the quality control kitchen (Tr. 104). She descended to the quality control kitchen and found Bembers and Rosen waiting for her. Bembers and Rosen knew that the employees for whom Farkas was the quality controller were in the process of voting (Tr. 1210; 1212). Supervisor Bembers directed Rosen to call her down so that ''we could put her to work on something rather than [her] sitting up there if her break was over.'' Indeed, Bembers testified that he called her down because ''it was told to me'' (Tr. 1210) that her break was over. ''She was summoned to come down because we thought her break was over'' (Tr. 1210).

Bembers told Farkas (Tr. 1211):

> [T]here are things that [you] can do in the lab. If the people out there in the plant are up voting and there is nothing out in the plant, there are things that can be done. Everything from washing dishes to cleaning up the lab, whatever the case may be.

It was not part of Farkas' job to wash dishes and quality control employees did not regularly wash dishes (Tr. 1211). When Farkas told Bembers that she never before had been asked to wash dishes when she had 20 or 30 minutes of free time resulting from the other employees attending captive-audience speeches, Bembers responded: ''Well, this is different'' (Tr. 105). Farkas then told Bembers, however, that she was still on her break period (Tr. 1211), and Bembers said that she should sit the rest of her break period in the office. Farkas never was given dishes to wash (Tr. 106). At this point, Farkas remarked that the employees were descending from the lunchroom and were finished voting. She told Bembers that she was going back to her job on the production line. Bembers did not say anything (Tr. 106) and left (Tr. 1211).

Bembers, as above-noted, testified that the reason that he called her down from the lunchroom where the employees were voting was that he received a report from ''somebody'' that Farkas' breaktime was over (Tr. 1212). As he had previously testified, in the passive voice, ''[it] was told to me her break was over'' (Tr. 1210). When Bembers was specifically asked who had told him that Farkas' break was over, he testified that he didn't remember ''if it was Gale Rosen or somebody else.'' (Tr. 1212.)

Again, Supervisor Rosen did not testify (although he was called, as above-noted, by General Counsel as an adverse witness for limited testimony).

Discussion and Conclusions

Farkas in October 1987, was the first and sole employee to engage in union activities by handbilling. Chairman of the Board Olson knew in which department she worked because he asked her and she told him. Supervisor Schreiner identified the quality control department as the font of union activity and Assistant Plant Manager Nelson testified that Sarah Farkas was one of three employees, known as union activists, against whom Respondent's ''no-talking,'' ''no-instructing'' rule was enforced. She was thereafter disciplined unlawfully because of her union activities.

Bembers' motive in summoning Farkas from the lunchroom, where line employees who were known to Farkas were about to vote, was to remove Farkas from their presence before they voted. He would find something for her to do, whether it was washing dishes, cleaning up the lab, or any other excuse; the object was to get her out of the voting area and away from employees who knew her and were about to vote. Given Respondent's union animus, this may not have been an unwise procedure, in view of Farkas' well known union support and activities and her familarity with the line employees.

Bembers repeatedly testified that he was told that she was not on breaktime in the lunchroom. In fact, however, when Bembers directed Rosen to telephone Farkas up in the lunchroom to remove her from the voting area, Farkas told Rosen that she was on her breaktime. Rosen was not called to deny this Farkas' testimony which I credit.

I also reject Bembers' testimony that ''somebody'' told him that Farkas' breaktime had been concluded. If he asked Rosen, Rosen would have told him that she was up on her breaktime. In fact, Bembers' testimony that he could not recall who told him that Farkas' breaktime was over, as I watched him testify, was clearly a fabrication because either he knew that her breaktime was not over or, more probably, he didn't care whether it was over or not. Indeed, his suggestion, following his testimony that he couldn't ''remember'' who told him, that it might have been Rosen who told him (Tr. 1212) was a mere fabrication. As I listened to him, his credibility was originally made doubtful in his use of a strained and awkward locution, testifying, in the passive voice, thus shielding the speaker, that it was ''told to me her break was over'' (Tr. 1210). When he said it might have been Rosen, the fabrication and credibility damage was clear.[34]

Respondent defends (Br. 23) by arguing that Bembers believed that Farkas was up in the lunchroom on a break, not because it was her breaktime but because there was no quality control work to do on the production line. If that were so, then why would he ask her to come to the quality control kitchen to wash dishes (''or clean up the lab, whatever the case may be'' (Tr. 1211)), a function which she had never previously performed and which was not part of her job description. This was purely a make-work excuse, any device to get her out of the lunchroom where the voting was going on. As Bembers testified, he brought her down because ''there are things that can be done.'' (Tr. 1211); it could be almost anything, ''everything from washing dishes to cleaning up the lab, *whatever the case may be*.'' A better description of pretextual make-work could not be suggested. (Emphasis added.)

Respondent further defends that Bembers did not know that she was on breaktime and learned of it only after he had summoned her to the quality control kitchen (R. Br. 23). I have found otherwise; that Farkas told Rosen she was on breaktime when he telephoned her. I find that, in any case, Bembers was not concerned with whether Farkas was on her

[34] The quality of such testimony is not inconsistent with that of the plant manager (Schmitz) who couldn't articulate why, departing from past practice, he recommended a written warning against a talkative employee. He simply did not know why he did it (Tr. 843).

breaktime. His object was to get her out of the voting area by any means possible. If he were concerned about whether he was invading her breaktime, he had only to ask Rosen who had just been told.

I conclude, consistent with General Counsel's argument, that, as alleged, Respondent violated Section 8(a)(1) of the Act by Bembers' directing Supervisor Rosen to get Farkas out of the voting area while she was on breaktime while employees with whom she was familiar were voting. He did this in order to avoid the possibility that Farkas' mere presence might influence employees in favor of voting for the Union. This isolation interfered with her lawful presence in the break area on her breaktime because of an improper motive.

7. Supervisor Schreiner tells quality control employee Sander that if another employee did not cease protected activities, she would be ''run out of town''; paragraph 5(z)

On the day of the election, June 24, 1988, Supervisor Gerard Schreiner and Allen Belseth, an employee whom he supervises on the ''roll line,'' had a conversation (Tr. 497).

On the Monday (June 27) following the election, Supervisor Schreiner approached quality control employee Susan Sander on the production floor, and said to her: ''I heard that Tina Noyes is going around getting statements from people'' (Tr. 205). When Sander answered that she didn't know and hadn't talked to Noyes, Schreiner said that he had ''heard that she was trying to get a statement from Allen Belseth about what [Supervisor Schreiner] had said to [employee Allen Belseth]'' (Tr. 205). Noyes had attempted to get a statement from Belseth concerning what Supervisor Schreiner had told him which would relate to objections to the election (Tr. 205). Schreiner told Sander: ''[w]hy doesn't she just let it die. People are sick of hearing about it'' (Tr. 205).

According to employee Sander, Schreiner then not only added: ''Somebody's going to run her out of town,'' but Schreiner told Sander to tell Noyes of that statement (Tr. 205). Sander told Schreiner that she wouldn't tell Noyes what Schreiner had just told her and told him that he could tell her himself (Tr. 206). Schreiner said: ''No, he was scared of her''; he was scared she'd change his words around'' (Tr. 206). In any event, on breaktime, Sander did tell Noyes what Schreiner had told her.

Supervisor Schreiner testified that while he was up in the lunchroom, he heard ''some ladies'' talking about Tina Noyes getting affidavits signed by employees. He heard ''some lady'' say that: ''they were sick and tired of the union stuff'' (Tr. 882) and he told Sanders that one of the ladies ''had mentioned about running Tina out of town'' (Tr. 887).

As Respondent argues (Br. 32) there is no major inconsistency between the two accounts and suggests that there is no violation because Schreiner ''was simply relating a truthful account of what he had heard.''

Discussion and Conclusions

On my evaluation of Schreiner's testimony and my observation of Schreiner, I conclude that he overheard no lunchroom conversation; that his testimony on the point is a fabrication; and that he intended to cause Sander to intimidate Noyes by her relaying this threat. I conclude that the threat was entirely Schreiner's and violates Section 8(a)(1) of the Act.

Assuming, arguendo, that Schreiner *did* overhear such a conversation, I would conclude that Supervisor Schreiner was not passing the time of day with quality control employee Sander. He had a message (for both Sander and Noyes) that he wanted Sander to deliver to Noyes. On that point, Sander's testimony is uncontradicted and Respondent concedes that Schreiner asked Sander to convey the message to Noyes (R. Br. 32). The message, in substance, was that something bad would happen to Noyes if she didn't stop taking affidavits from employees concerning Respondent's possibly objectionable conduct in the election. The fact that the agency which would visit the ''something bad'' on Noyes was perhaps ''some lady'' whom he overheard in the lunchroom or perhaps some unknown agent, is irrelevant. Indeed Schreiner's failure to mention the agency which would accomplish the ''running out of town'' of Noyes makes the statement which he wanted conveyed through Sander even more ominous.

As noted, above, in *El Rancho Market*, supra, 235 NLRB at 471, the ''illegality of an employer's conduct is determined by whether the conduct may reasonably be said to bave a tendency to interfere with the free exercise of employee rights under the Act'' rather than the employee's motive or the successful effect of the coercion. In that instant case, Schreiner's message to Noyes, via Sander, was that she would be ''run out of town'' by one of its employees[35] if she did not cease her efforts to acquire affidavits in support of the Union's objections to the election. When Sander told this to Noyes, it is quite evident that she would ''get the message.'' Such ''bad things'' that would or might befall Noyes at the hands of Respondent's employees (over whom Respondent has control) if she continued engaging in protected activity (seeking employee statements as a basis of objections to the election) were coercive against both Noyes and Sander. Schreiner's admonition violates Section 8(a)(1) of the Act. Compare: *J. W. Mays, Inc*., 147 NLRB 942, 964 fn. 81 (1964), with *El Rancho Market*, supra at 471 (Respondent's intent and the actual effect on employees not the test for coercion under Section 8(a)(1).

8. Respondent allegedly threatens employees that it will not negotiate over a contract, will force a strike, will close the plant before negotiating over or signing a contract; paragraph 5(k): objectionable conduct[36]

John Birch, a maintenance employee, was employed by Respondent for a total of more than 25 years (Tr. 584). During that time, in several of Respondent's production facilities, he was an assistant supervisor, superintendent, and assistant plant manager. While he supported the Union, he was not part of the organizational effort (Tr. 584–585).

[35] It is irrelevant that Schreiner himself would not run her out of town. It is enough coercion under Sec. 8(a)(1) that someone else would run her out of town where the action is not beyond Respondent's control. Cf. *J. W. Mays, Inc*., 147 NLRB 942, 964 fn. 81 (1964), enfd. 356 F.2d 693, 699 (2d Cir. 1966).

[36] As General Counsel's brief suggests (Br. 51), the remaining alleged unfair labor practices and objectionable conduct occurred among employees in departments other than the quality control department.

In mid-May 1988,[37] when Birch had temporarily relieved another employee operating Respondent's toolcrib, Assistant Supervisor Rick Noyes (assistant supervisor in bulk packing and in the chill room (Tr. 585)) and Lester Goff (assistant supervisor of the day-shift deboning line) entered the toolcrib room and paused at the counter. Rich Noyes opened the conversation by asking Birch: ''How is it going?'' ''What do you think of the Union?'' (Tr. 587) to which Birch replied ''doing pretty good'' (Tr. 587; 1134). At the time, Birch was reading the collective-bargaining contract between Respondent's corporate parent (Hormel) and its employees in its Austin, Minnesota plant (Tr. 1134). Birch told Goff and Noyes that the unionized employees in the Austin, Minnesota plant were making more money than the employees in plant 4 and that, should the union become plant 4's bargaining representative, there would be more maintenance men employed, supervisors would not be working on machines, and supervisors would be making more money (Tr. 1111; 1135). Prior to Goff and Noyes becoming assistant supervisors, they had, as employees, distributed union membership appplication cards among Respondent's employees (Tr. 586).

Noyes said that they had just come from a supervisors' meeting where (vice president) John Jeffords said that if the Union got in, Respondent wouldn't negotiate, the Union would go out on strike and close the plant down (Tr. 587). Birch told them (Tr. 587):

> [Y]ou guys in your position shouldn't be running around telling people stuff like that. I've been in management before and I know a considerable amount about elections and everything like that and I know what you can say and what you're not suppose to say . . . you're just being dumb. Usually they get somebody with no authority at all to spread rumors, that's what they [used to do], you know.

Birch said that at this point, employees were coming to the toolroom to get tools and a crowd formed. He testified that they heard the argument and at this point Noyes and Goff left (Tr. 589).

A couple of weeks later, at a union meeting, Birch was elected as an ''alternate'' on the union negotiating committee (Tr. 589–590).

Respondent called Goff and Noyes to meet Birch's testimony. Goff testified that when he and Noyes walked into the toolcrib room, and Noyes asked Birch how was it going, Birch was reading the Hormel contract and told them: ''[H]ere is what we're going to get if we get the union in . . . everything is in this book'' (Tr. 1111). He and Noyes testified that Birch said that the Hormel employees at Austin were making considerable more money than the plant 4 employees; that there would be a maintenance man standing at every machine; and that the supervisors wouldn't be allowed to work on machinery any more and wouldn't get greasy (Tr. 1111; 1135). Goff and Noyes testified that there was no angry discussion at this point and all parties were ''just talking normal'' (Tr. 1112). Goff recalls that Birch then said that Noyes and Goff should ''be for this'' because anything the employees would get, the supervisors would also get (Tr. 1112, 1135).

According to Goff, Birch then told Noyes that he was ''dumb'' and uttered some vulgar reference to Noyes; and in return, Noyes told Birch that he was no dumber than Birch and that they left (Tr. 1113, 1137). They testified that the doors of the toolcrib were closed and that there were no employees in the area when they left (Tr. 1137).

Noyes testified that Birch, referring to the Hormel contract, said that both the employees and the supervisors would be making ''a lot more'' money (Tr. 1136). And when Noyes told Birch that the Union couldn't guarantee gaining what was in the Hormel contract (Tr. 1137), Birch became angry, called Noyes ''dumb'' and uttered a vulgar statement to Noyes and Goff (Tr. 1137). As above-noted, both Noyes and Goff said that Noyes answered Birch by saying that Noyes was no dumber than Birch and that they left (Tr. 1137).

Discussion and Conclusions

1. Solely on the basis of my observation of the demeanor of the witnesses, I would, with no hesitation, credit Birch's testimony over that of Goff and Noyes where inconsistent. Birch appeared to me to as a calm, understated person, a believable witness.

2. As noted below, Noyes and Goff were both engaged in unfair labor practices of a similar nature with other employees. In those circumstances, I have credited those other employees. While such a disposition is certainly not conclusive on the above event, I note that expressions of union animus by Goff and Noyes, acting together and singly, in other circumstances, tend to have me credit Birch even in this particular circumstance, rather than Noyes and Goff. In particular, as will be seen hereafter, Rick Noyes' union animus transcended the Union's loss of the election on June 24. Not satisfied with the verdict of the ballot box, Noyes could not resist visiting the Union's election eve ''victory celebration'' party, mouthing antiunion statements, and sought to pick a fight with union adherents. Such a demonstration of union animus leads me to conclude that his convergation with Birch in the toolcrib did not involve an academic discussion of Birch's sympathies with the Union as Noyes and Goff testified.

3. All witnesses agree that Birch said that Goff and Noyes were ''dumb.'' All witnesses agree that at this point, the conversation became heated. Goff testified that Birch's use of ''dumb'' was precipitated by Birch telling them that they should be for the union because any greater employee benefits would also be received by the supervisors (Tr. 1112). Noyes testified that Birch became angry, calling Noyes ''dumb'' because Noyes told him that the Union couldn't guarantee to plant 4 employees what Hormel had given in the Austin, Minnesota contract (Tr. 1136–1137).

Goff's version does not link Birch's use of ''dumb'' with anything. It merely follows Birch's own statement that Noyes and Goff should support the Union and its quest for a contract. There is simply no nexus in Goff's testimony between what had happened previously and Birch's alleged anger and use of the word ''dumb.''

While Noyes' version of what precipitated the use of the word ''dumb'' is different than Goff's (the Union couldn't guarantee the benefits obtained in the Hormel contract), it at least suggests a basis of why Birch would call Noyes ''dumb.''

[37] The parties appear to agree that this event occurred, not on June 2, as alleged in the complaint, but in mid-May 1988 (Tr. 1107).

I conclude, however, that neither the testimony of Noyes nor that of Goff offers a satisfactory explanation why Birch would call Noyes ''dumb'' and why Noyes would get angry. Rather, I credit Birch's version: that he called Noyes (and Goff) ''dumb'' only in the declaration that persons in their ''position shouldn't be running around telling people, stuff like that'' (Tr. 587). The obvious reference was that since Goff and Noyes were statutory supervisors, they were making unlawful statements concerning alleged Jeffords' threats which might upset the election (Tr. 587) and they had authority to bind the Respondent (''usually they'd get somebody with no authority at all to spread rumors'') (Tr. 587). Their anger was derived not from being called ''dumb'' but from their recognizing that Birch exposed their vulnerability to an accusation of unlawful behavior.

On the above three grounds, I credit Birch's testimony and conclude that, as alleged, in mid-May 1988, Supervisor Noyes threatened employee Birch, and those overhearing, that if the Union succeeded in becoming the representative of employees, Respondent would not negotiate or contract, thereby forcing employees to go on strike which would cause Respondent to close plant 4 (complaint par. 5(k)). I further conclude that such statements violate Section 8(a)(1) of the Act.[38]

9. Alleged violations of Section 8(a)(1); Assistant Supervisor Goff's June 2, 1988 alleged threats that Respondent would not bargain to agreement with the Union: that if the Union got in, Respondent would close the plant or hire new help before signing a contract with the Union; paragraph 5(1); objectionable conduct

While waiting to load trucks, shipping department employee Kevin Shaw, an employee for 5 years, heard Assistant Supervisors Les Goff and Rick Noyes discussing voting in the forthcoming Board-conducted election (Tr. 556–557). Shaw places the conversation as occurring after April 14, 1988 (Tr. 556), the date of filing the peition for certification by the Union.

Shaw overheard them telling employee Terry Ostlund not to vote ''yes'' in the election; that Respondent would close down the plant; and that there would be plenty of Mexicans in Willmar [Willmar, Minnesota] ''to fill our shoes, our jobs . . . [and] the company wouldn't agree to anything that the Union would negotiate for'' (Tr. 556). Shaw joined the conversation and told the group why he wanted the Union and what it would do for them. He told Ostlund not to listen to the supervisors because ''they are just trying to get ahead by coercing other people not to vote yes'' (Tr. 447). When Ostlund asked Shaw if Respondent would actually close the plant or hire new employees, Shaw said: ''[n]o way . . . they are making too much money . . . they've got too many turkeys on hand . . . no way'' (Tr. 557–558). At this point, Goff told Shaw to ''[''blank''] off'' and he walked away. Before Goff left, Shaw told Noyes: ''fine if you want to live in a trailer house the rest of your life and don't want to better yourself, your benefits and your wages, you go ahead and do so . . . stick with your beliefs'' (Tr. 558). Noyes answered that Respondent would never agree to anything; would not agree to giving the employees more pay. Shaw answered that more pay was the last issue that the employees were fighting for; the employees wanted better working conditions and benefits and hopefully better pay (Tr. 558).

Goff testified that he only had one heated discussion with Kevin Shaw; that it was on June 2, 1988; that although employee Terry Ostlund, a friend of Goff's, was nearby, Ostlund did not participate in the conversation with him or with Assistant Supervisor Rick Noyes when he later joined the conversation (Tr. 1098). Goff denied telling Ostlund how to vote in the election; denied telling him that if the Union won the election, Respondent would close the plant; denied stating that Respondent would not agree to anything or would not negotiate; denied saying that if the Union won the election there were plenty of Mexicans in Willmar to fill the employees' shoes or their jobs; or that the Respondent would not bargain with the Union for an agreement; or would not negotiate with the Union; or that Respondent would hire new help before signing a contract with the Union and would not agree to anything that the Union would negotiate for (Tr. 1099–1101). Rather, Goff testified that on June 2, 1988, after the afternoon break, Goff saw employee Shaw and five or six other shipping employees (Terry Ostlund was standing nearby (Tr. 1091) apparently waiting for a truck and Shaw was speaking to this group in a fairly loud voice (Tr. 1092). Goff overheard Shaw tell the employees that the employees were going to support the Union; that they were going to go on strike; and that they were going to close down the plant (Tr. 1092). He said that Shaw also said: ''We'll show them who is in control'' (Tr. 1092).

Goff testified that he then approached the group and said to Shaw: ''Yeah, what about my people. They've told me on several occasions that they can't afford a strike and they don't want the plant to go out on strike'' (Tr. 1093). Goff said that he then left the group but Shaw tagged along behind him for 15 or 20 feet and asked him when Goff was going to ''wake up and support the Union''? He told Goff that anything the employees got, the supervisors would also get (Tr. 1094); and that since Goff had been promoted to assistant supervisor (''gotten my yellow hat''), he had been ''brain washed'' (Tr. 1094). When Goff asked Shaw how the Union could guarantee that the employees would get anything, Goff said that Shaw became angry (at this point in his testimony, Goff testified: ''let me think here'' (Tr. 1094)) and said that the Union would negotiate and get everything that it asked for. When Goff asked him what he would do if Respondent did not grant everything the union asked for, Shaw said that the employees would go on strike and the plant would have to close down. ''Then they'll have to give us everything we want'' (Tr. 1094). When Goff asked him about Goff's employees on the deboning line who stated that they feared a strike and couldn't afford one, Shaw became louder and accused Goff of patronizing the employees on the

[38] The truth of whether Noyes and Goff had attended a meeting at which Vice President Jeffords made these alleged threats is irrelevant. I find only that Noyes and Goff told Birch that he did. To the extent that General Counsel states that Noyes did not deny Birch's testimony that Noyes said that he had come from a meeting with Vice President Jeffords at which the Union was discussed, General Counsel overlooks Noyes' explicit denial (Tr. 1138). To the extent Respondent argues that the coercive effect of any statements by Goff and Noyes should be discounted because, as assistant supervisors, they are the lowest ranking statutory supervisors in Respondent's employ, citing *Cal-Western Transport*, 283 NLRB 453 (1987), it should be noted not only that the similar activities of Goff and Noyes with other employees were, apart from the Birch incident, fragrantly in violation of the Act, but that their activities were not inconsistent with Respondent's demonstrations of union animus through the acts of its higher supervisors.

deboning line (''What do you mean your people? Who the hell are you, Moses? . . . are they your fucking peons that you can shit on all the time?'' (Tr. 1095)). Goff said that he denied that they were ''peons'' and that they merely worked under him sufficiently to provide Goff with a job and because they were his friends. (Tr. 1095.) Goff recalls, inter alia, that Shaw said that he wanted more money and benefits and was tired of living in a trailer house, and that if Goff wanted to live in a trailer house, that was up to him (Tr. 1095).

Goff also recalled that Shaw said that the Union was going to negotiate and receive $9 an hour; that there would be no ''low class'' in Willmar and that the whole economy was going to change (Tr. 1096). At this point, Goff said that he left and the conversation ended (Tr. 1096). Finally, Goff testified that Assistant Supervisor Rick Noyes was present for the last half of the conversation (Tr. 1118).

Goff admitted that his prior relationship with Shaw had been warmer than it was at the time of the above conversation; that he had been a union supporter and that he once gave Shaw a union authorization card to sign (Tr. 1119–1120). He also testified that after he became a supervisor, his feelings about the union changed (Tr. 1120).

Assistant Supervisor Rick Noyes testified that he came upon Noyes and Kevin Shaw while they were having an argument (Tr. 1128). He corroborates Goff's testimony that Goff told Shaw that employees told him that they didn't want to strike and couldn't afford it; and that Shaw said that the employees were going to get $9 an hour and there would be no lower class in Willmar and that be was tired of living in a trailer house (Tr. 1129). He also corroborates Goff's denial that Terry Ostlund was involved in the conversation; indeed, he never saw Terry Ostlund during the conversation. Like Goff, he specifically denied all of Shaw's testimony.

Discussion and Conclusions

In principal part, Shaw testified, and Noyes and Goff denied, that it was Goff who stated that Respondent would close the plant before agreeing to any terms with the Union.

Noyes' testimony, supporting Goff, presents the ancient problem of whether it was corroboration or collusion. Although there was great precision in the corroboration of Goff by Noyes, it appeared to me that Goff's testimony was rehearsed in large part and that the corroboration was the product of rehearsal with Goff rather than Noyes' recollection of being present at the Goff-Shaw conversation. In addition, I was not at all impressed with Goff's remark, during his testimony, that in order to testify as to the events, he had to first ''think'' about what occurred (Tr. 1094).

Furthermore, principally for the reasons stated in the previous section, I discredit the testimony of Noyes and Goff, though mutually corroborative, and credit Shaw's testimony. I do so notwithstanding that I believe that Shaw, as Noyes and Goff testified, was hot headed, openly prounion, and perhaps antagonistic. But Shaw's remarks are not in issue. I also observed Goff's obvious reluctance to admit not only that his attitude about unions changed with his becoming a supervisor, but his tentative admission that he had formerly been friendly with Shaw, had done work on Shaw's car at Shaw's house, had formerly been a union supporter, and had, indeed, distributed a union membership application card to Shaw. For these reasons, I would credit Shaw's testimony and find that, as alleged, in violation of Section 8(a)(1) of the Act, Assistant Supervisor Goff threatened employees that Respondent would not bargain to agreement with the Union and, if the Union got in, Respondent would close the plant or hire new help before signing a contract with the Union.

10. Alleged violations of Section 8(a)(1) of the Act (complaint paragraph 5(d): objectionable conduct; Assistant Supervisor David Lyon allegedly threatens that Respondent would close down if the Union was voted in and that Respondent would never agree to anything in bargaining

Sometime around the middle of May 1988, Shaw engaged in a conversation with his immediate supervisor, Assistant Shipping Supervisor Dave Lyon. This was one of several conversations about the Union. Lyon had been speaking to someone else at the time and Shaw approached him, got into a conversation with him, telling him that the Union's success would ''better him . . . and us, the workers, back there'' (Tr. 554). Shaw says that Lyon responded: ''[Respondent] would never agree to anything, that the Union would try to negotiate with them, they would close down the plant as far as that, hire new workers.''[39]

Assistant Supervisor Lyon testified that he had several conversations with Shaw about the Union; all of which were in January or February 1988 (Tr. 1019) in which Shaw told him that when the Union got in, everybody's wages would go up; and the supervisors wouldn't be able to tell the employees what to do (Tr. 1020). Lyon testified that he told Shaw that if the Union got in, Respondent would have to bargain in good faith but it wouldn't have to agree to all the Union's demands. Lyon testified that Shaw became angry and would leave the conversation (Tr. 1019; Tr. 1020). Lyon recalls telling Shaw, in response to Shaw's statement that the employees would strike if Respondent did not agree to the Union's proposals, that if the employees went on strike, Respondent had the right to hire replacements (Tr. 1020–1021). It should be noted, however, that in each of the questions put to Lyon with regard to these conversations, except the first one (Tr. 1019), the date for the conversation was suggested by counsel to Lyon in direct examination (Tr. 1020; 1021).

When counsel thereafter inquired, *without* providing the date to the witness, what was the date of the last discussion (concerning the Union) that he had with Shaw, the witness testified: ''It would have to be *after* March, 1988'' (Tr. 1021) (emphasis added). In view of the witnesses' prior answers, both voluntary and in response to the leading questions, and in view of the change in testimony, I inquired: ''It had to be after that? (Tr. 1021). The witness' answer was: ''Yup'' (Tr. 1021). The examining attorney then asked: ''So your last one-on-one discussion with Kevin Shaw, what is your best recollection of when that would have occurred?'' The witness then answered: ''It would have to be before March of 1988. Before March'' (Tr. 1021). When I then stated that he had just testified that it was ''after'' March, the witness repeated: ''It would have to be before March of 1988'' (Tr. 1021–1022).

[39] Shaw testified that the conversation with Assistant Supervisor Lyon was not the same one as that, immediately above in the text, that he had with Assistant Supervisors Noyes and Goff. He said that although the substance of the conversation was the same, he insisted he was not confusing the two (Tr. 556).

Lyon insisted that he had not a single conversation with him in March (''not one-on-one, no'' (Tr. 1023)). He further testified that, in March, Shaw did not even try to have a conversation with him about the Union (Tr. 1023) and then recalled that Shaw did attempt to have conversations with him but that he simply walked away at Shaw's approach (Tr. 1023).

Discussion and Conclusions

Lyon's testimony is not to be credited because of his subceptibility to changing his testimony pursuant to leading questions, with the answers suggested by the examiner on direct examination. In order to have any of the alleged unfair labor practices constitute objectionable conduct, the alleged unfair labor practices must have occurred after the April 14, 1988 filing of the petition for certification, i.e., in the *Ideal Electric* period, which the Board prescribes as the earliest date on which objectionable conduct can occur. In the instant case, the unfair labor practices, *as objectionable conduct*, must occur, if at all, on and after April 14, 1988, the date of the filing of the petition.

In his direct examination, it is true, David Lyons at first specified the date of the conversations with Shaw as occurring only in January and February 1988. Thereafter, pursuant to leading questions, he reinforced the dates as January and February 1988.

Finally, when permitted to testify without being lead he said that the conversations occurred ''after'' March 1988, thus permitting the *possible* inference that they occurred as late as after April 14, 1988. The examining attorney, obviously dissatisfied with Lyon's equivocal testimony, that the conversations could have occurred ''after'' March 1988, returned to question the witness with emphasis on *when* the conversations occurred and the witness promptly changed his testimony so that these conversations, and the resulting possible objectionable conduct, could not have occurred in the *Ideal Electric* period, but rather prior to March 1988.

I have considered the possibility that his changes in testimony were mere mistakes. I am unable to find that they were.

Lyon's switch of testimony does not reflect well on his credibility, and in this important matter, negatively affects his overall credibility. I am therefore constrained to conclude, on the basis of the preponderant credible testimony, that Kevin Shaw's version of his conversation with Lyon, in or about mid-May 1988, was closer to the truth than Lyon's denials. I therefore conclude that, in or about mid-May 1988, Assistant Supervisor Lyon, in violation of Section 8(a)(1) of the Act, coerced Kevin Shaw, an employee, by telling him that the Respondent would never agree to anything in collective bargaining that the Union would propose and would close down the plant and hire new workers before any such agreement (Tr. 554).

11. The postelection threats of Assistant Supervisor Rick Noyes that employees would no longer have jobs and challeging employees to a fight because of their erstwhile support of the Union; paragraphs 5(x) and (y)

As noted above, I have concluded that Assistant Supervisor Rick Noyes, whether acting independently or in conjunction with Assistant Supervisor Goff, engaged in unfair labor practices demonstrating union animus.[40]

The polls at the Board-conducted election closed at 8 p.m. on June 24, 1988. Assistant Supervisor Rick Noyes had been at the count of the ballots and *testified* that he went to the Kandie Entertainment Center about 9:30 p.m. (it was actually considerably earlier, closer to 8:30 p.m.) allegedly after consuming 10 to 12 beers which left him, as he testified, intoxicated (Tr. 1140–1141). The Kandie Entertainment Center, a public bar having an upstairs level, was the site of the union postelection party. Union supporters, including employees, were gathered there awaiting the election results. At the time that Rick Noyes arrived, there were about 75 to 100 employees waiting for the results of the election (Tr. 531).

Kevin Shaw arrived at the Center between 6 and 7 p.m. Sometime thereafter, he used a pay phone to call a coemployee when Supervisors Rick Noyes, Jim Cully, and Terry Teberg came up behind him (Tr. 560). Noyes told him that a tally of the votes showed that the Union had lost; that the employees who supported the Union were a bunch of losers and might as well get on the employment line (Tr. 560).

Chad Young, an employee of the Hormel Company at a plant in Austin, Minnesota, and also first vice president of Local 9 (of the same parent Union as the Charging Party) was upstairs at the Kandie Center at this time. He places the incident at 8:30 p.m. (Tr. 539). Young, an organizer for the Charging Party among Respondent's plant 4 employees prior to this time, heard Noyes say (he recognized his voice from a previous meeting): ''You're going to be fired, you're all done, you guys lost, you're a bunch of losers, you might as well go to the unemployment line'' (Tr. 531). At this point, Young started down the stairs. He told some employees who were following him to remain upstairs because he didn't want ''any problems'' (Tr. 532). Young saw Kevin Shaw (whom he knew) with the phone in his hand and saw Rick Noyes 2 or 3 feet from him, in the company of Respondent Supervisors Fernholtz and Cully (Tr. 532). Young testified, without contradiction, that Noyes repeated that the employees were a bunch of ''losers,'' ''[y]ou don't have a job anymore, you might as well go to the employment line'' (Tr. 533). As Young approached the group, Noyes told Shaw: ''Come on, let's go outside, where's your big Union now to protect you'' (Tr. 533). Young saw that Noyes had been drinking, was unsure whether he was intoxicated (Tr. 543–544), but observed that Noyes was standing close to Shaw while saying these things and was ''harassing him'' (Tr. 543). Young stepped between them while Noyes was trying to get at Shaw, challenging him to a fight. He was trying to get around Young, asking Shaw to ''go outside'' or have Shaw ''take a swing at him'' (Tr. 534).

At this point, Noyes' attention focused on Young and he asked Young ''how tough [he] was'' and Young answered: ''[You don't] want to find out how tough I am'' (Tr. 544).[41] When Noyes then shoved Young, Young pushed him away and told him to ''leave Kevin [Shaw] alone.'' Supervisors

[40] Respondent's brief does not refer to the pars. 5(x) and 5(u) allegations and apparently does not seek to challenge the General Counsel's version of the facts.

[41] This may have been sound advice. Young was a Golden Glove champion in 1976–1978 (Tr. 545).

Fernholtz and Cully then grabbed Noyes and took him away (Tr. 546).

Discussion and Conclusions

On the basis of the above testimony, I conclude that Noyes (and his cosupervisors) went to the Kandie Center, which they knew was the focus of a gathering of union supporters, impelled by union animus, Noyes spurred on by alcohol, to vent that animus against the union and its supporters. As alleged in paragraph 5(x) of the complaint, Noyes there told the employees that because the Union lost the election, the employees would no longer have employment with Respondent; and, as alleged in paragraph 5(y), challenged both Shaw, a Respondent employee, and Young, an employee of Respondent's parent, to a fight, because of, and in retaliation for, their union activities and support.

Since the matter is not addressed in Respondent's brief, and since General Counsel argues that Respondent's apparent defense is that Noyes was intoxicated, and there appearing no other plausible or apparent defense, I conclude that Noyes' apparent intoxication, as General Counsel argues, provides Respondent with no defense. Whatever has alleged intoxication, there is no suggestion that he didn't know what he was doing, *Hitchiner Mfg. Co.*, 243 NLRB 927, 928 (1979). Not only would I make this finding were Supervisor Rick Noyes alone (in his statements to employees regarding future employment and his challenging of these persons to fight), but it is apparent that the other supervisors, Fernholtz, Cully, and Teberg, who were with him and present all during the confrontation did not seek to restrain him in his statements or his physical confrontation with Shaw and Young, and must be seen as supporting and condoning Noyes' conduct. I thus conclude, quite apart from any Noyes intoxication, that Respondent's other supervisors, apparently harboring or condoning the same animus as Noyes, by their failure to restrain him in his physical and verbal acts, must share the responsibility along with Noyes and Respondent. I find that that Respondent, on June 24, after the election, but in violation of Section 8(a)(1) of the Act, committed the Acts as alleged in complaint paragraphs 5(x) and (y).

12. Alleged violation of Section 8(a)(1) of the Act; Assistant Supervisor Jan Leuze allegedly threatens employees by telling an employee who favors the Union to find a job in a union shop because the Union would not get into Respondent; paragraph 5(e); objectionable conduct

On or about May 11, 1988 (Tr. 423–425, 435), at about 9 a.m., on breaktime (Tr. 425), deboning line employee Vicky Christenson was sitting at a table with coempoyees Florence Riegstead, Donna Schaffer, Lynn Ascemann (Tr. 431), Janice Ostland (Tr. 432), and other employees. During the union organizational campaign in January and February 1988, Christenson had distributed union membership application cards and union handbills, and was a member of the Union's organizing committee (Tr. 423). The supervisors on the deboning line were Chuck Vilven and his assistant supervisor, Jan Leuze.

Florence Riegstead was speaking with Christenson about union matters, questioning Christenson about benefits enjoyed by employees at Hormel (Tr. 427). Christenson described the benefits at Hormel compared to Respondent's employees' benefits at plant 4. They also discussed Jennie-O subsidiary of Hormel and the legal effect of that relationship (Tr. 427).

At this point, Jan Leuze, the assistant supervisor, apparently overhearing the conversation said: ''Well, Hormel owns [Respondent] but we aren't legally under them,'' to which Christenson said: ''Yes, we are, if Hormel owns [Respondent] we are a subsidiary of Hormel''; and Leuze, disagreeing answered: ''No we aren't'' (Tr. 427–428). Christenson said: ''[Respondent] hasn't done anything for us either and I'd like to give the union a chance'' (Tr. 434), a remark which she made on other occasions (Tr. 434–435). Assistant Supervisor Leuze, placing her hands on the table, said: ''Well, if you like unions so well, why don't you work at a union job since the union isn't getting in'' (Tr. 428). Leuze then got up and left the table. There was no comment from nearby employees (Tr. 429).

Respondent neither called Assistant Supervisor Jan Lueze to answer this testimony nor did it explain why Lueze did not testify.

Respondent presented Susan Torkelson, an employee on the deboning line with Christenson, and wife of Assistant Supervisor Arvid Torkelson (Tr. 1317). Torkelson testified that she arrived in the lunchroom where the employees were on break at about 9:10 a.m. and the conversation involving the employees was already taking place when she got there (Tr. 1314–1315). The only nonparticipant in the conversation was Donna Shaffer who accompanied her as they entered the lunchroom break area (Tr. 1315).

Instead of there being a conversation between Christenson and Riegstead, Torkelson testified that the conversation was between Donna Schaffer and Christenson concerning the pros and cons of the Union, with Schaffer speaking against the Union and Christenson in favor of the Union (Tr. 1315). Torkelson testified that Donna Schaffer told Christenson that: ''If [you are] unhappy with working at Jennie-O, [you] should go back to [your] old job or find a new one'' (Tr. 1316). Torkelson testified that Supervisor Jan Lueze, who was present, said nothing (Tr. 1316).

Discussion and Conclusions

I credit the testimony of Vickie Christenson and discredit the testimony of Susan Torkelson: (1) Respondent failed to call its assistant supervisor, Jan Lueze, to answer Christenson's testimony. Lueze's gratuitous remark to Christenson, while Christianson was on breaktime, in a break area, was discussing union matters with coemployees, that if she liked unions ''so well,'' why didn't she work at a union job since the union wasn't ''getting in,'' is coercive since it constitutes an implied threat of discharge. Little else can be inferred from such a suggestion, *Sans Souci Restaurant*, 235 NLRB 604, 606 (1978).

I believe an adverse inference should be drawn from Respondent's failure to call Jan Lueze. As a member of management, it would be expected that her testimony would be favorable to Respondent. Respondent's failure to produce Lueze to counter Christenson's testimony when Lueze had direct involvement in the conversation, according to Christenson, leads to this adverse inference. *Property Resources Corp. v. NLRB*, 863 F.2d 964 (D.C. Cir. 1988).

In addition to the adverse inference flowing from Respondent's failure to call its own supervisor to counter Christenson's testimony, Respondent chose to counter such testimony through Susan Torkelson, the wife of an admitted assistant supervisor. There were several other employees (especially Donna Schaffer) available if Respondent sought an employee to counter the Christenson testimony rather than the weaker testimony of its own assistant supervisor. While I do not suggest that the testimony of the wife of the assistant supervisor is necessarily tainted, that possibility surely exists out of her reasonable loyalty to her husband who represents management. Cf. *NLRB v. Advertisers Mfg. Co*., 823 F.2d 1086 (7th Cir. 1987). In any event, it is well settled that the production of weaker evidence when stronger evidence is available leads to an inference adverse to the producer of the weaker evidence, *Automobile Workers (Gyrodyne Co.) v. NLRB*, 459 F.2d 1329 (D.C. Cir. 1972). Thus on the basis of both adverse inferences, Christenson's testimony is to be credited over Torkelson's.

Furthermore, I regard the accuracy of Christenson's testimony to be superior to Torkelson's. Christenson's testimony specifically showed that in her conversation with the group, she was speaking consistently and directly to Florence Riegstead rather than to Donna Schaffer. Christenson's testimony and its specificity (Tr. 428), including, for instance, her observation that Supervisor Lueze, leaving the table, put her hands on the table as she was saying that Christenson should seek work at a union plant, seems to me to be an element of credibility and precise recollection.

Lastly, there is the fact that Christenson is an employee currently employed by Respondent and testifying directly against Respondent's interest. Such a situation, according to established Board evidentiary rules, constitutes an element in favor of crediblity. *S. E. Nichols, Inc*., 284 NLRB 556 (1987); *Georgia Rug Mill*, 131 NLRB 1304, 1305 fn. 2 (1961), enfd. as modified 308 F.2d 89 (5th Cir. 1962).

For all these reasons, I credit Christenson over Torkelson and conclude that, as alleged, Respondent violated Section 8(a)(1) of the Act by Supervisor Jan Lueze telling employees, including Vicky Christenson, that Vicky Christenson should look for a job in a union shop because the Union was not getting in.

13. Alleged violations of Section 8(a)(1): Assistant Plant Manager Nelson calls employee Rosaasen a ''traitor'' allegedly because of his engaging in activities supporting the Union; paragraph 5(o) of the complaint; objectionable conduct

Ordine Rosaasen, employed by Respondent for 3-1/2 years, works on the hotdog line. During the union organizational campaign, he distributed union hats (''Union Yes'' hats) in the Respondent's driveway (Tr. 515).

On June 17 (Rossaasen's birthday (Tr. 516)), 1 week before the election, while Rosaasen was wearing the ''union hat,'' Assistant Plant Manager Nelson approached him, called him a ''traitor,'' and asked him if he [Nelson] screwed Rosaasen out of anything (Tr. 516), to which Rosaasen replied: ''Yes [you] did (Tr. 516). Nelson's face turned ''beet red'' and Nelson walked away (Tr. 516). Rosaasen could not recall whether, when Nelson was walking away, he raised his hands and said: ''[w]here did we go wrong'' (Tr. 518).

Nelson testified that the conversation occurred while Rosaasen was leaving the men's room and that he merely asked Rosaasen: ''Where did we go wrong? What happened?'' (Tr. 925.) At that point, Rosaasen merely left for his lunch break (Tr. 926).

Nelson denied calling Rosaasen a traitor, at that time or any other time, did not ask him if he had ''screwed him out of anything,'' and Nelson denied that he was angry at the time (Tr. 926).

Discussion and Conclusions

I credit Rosaasen's version because of the circumstances surrounding (1) when the conversation occurred; (2) the fact that Nelson's face turned beet red in the conversation; and (3) that Rosaasen's statement of the circumstances surrounding the event struck me as more plausible, especially that Rosaasen, a currently employed employee working under the ultimate supervision of Assistant Plant Manager Nelson, recalled this incident as having occurred on his birthday. In addition, a line employee, presently employed by Respondent does not recall lightly having been called a ''traitor'' by the assistant plant manager.

In its brief, Respondent argues (Br. 30) that ''militating in favor'' of Nelson's version of the conversation and against Rosaasen's ''more hostile version'' is that the two employees had basically a friendly relationship before and after the encounter. Respondent urges that it is ''unlikely they would have remained on such terms if the hostility described by Rosaasen actually took place.'' The most that can be said on this record is that they were not hostile to each other. Indeed, the very lack of hostility raises the question why the employee would lie to entangle a friendly supervisor. The fact that this relationship did not change is too ambiguous, under the present circumstances, to infer that Rosaasen's ''hostile version'' was untruthful: if Rosaasen remained friendly towards Nelson, it might be merely a cover of self-protection; if Nelson remained friendly towards Rosaasen, he would be wise to do so under the existing circumstances and not exhibit a hostility further than the word ''traitor'' demonstrated.

I conclude that, as General Counsel urges, Nelson describing and calling Rosaasen, an employee, a ''traitor'' before the election and asking him how Respondent had ''screwed him,'' violates Section 8(a)(1) of the Act and is an element of objectionable conduct. Where Nelson asked Rosaasen how Nelson had ''screwed him'' after accusing Rosaasen of being a ''traitor'' he was implicitly interrogating Rosaasen to explain on what grounds Rosaasen was a supporter of the Union. This amounts to hostile interrogation, *Jones Plumbing Co*., 277 NLRB 437, 439 (1985) (John Wysocki).

14. Violation of Section 8(a)(1): the actions of Supervisor Chuck Vilven paragraphs 5(m), (q), (s), (v), (w), and (bb), certain objectionable conduct

15. Paragraph 5(m) unfair labor practice; objectionable conduct

Garry Freiborg, first employed by Respondent in 1981, worked for Respondent for about 3 years (Tr. 520). Prior to that time, he had worked for the railroad and had been laid off (Tr. 520). Sometime in 1985, he received a recall letter from the railroad, quit Respondent, and returned to the railroad (Tr. 520). He worked for the railroad for 7 to 9 months,

was again laid off, and was rehired by Respondent in 1985 to do cleanup work (Tr. 520).

Freiborg was not active on behalf of the Union during the organizational campaign (Tr. 520). He wore a union hat only once, that being in mid-June, the day after the union hats were distributed (Tr. 521). About 7 a.m. on that day, while he was beginning work and wearing the union hat, Supervisor Chuck Vilven came up to him and put his hand on Freiborg's shoulder. Freiborg turned around and saw that it was Vilven with whom he had gotten along pretty well. Vilven said to him: ''What kind of person are you?'' Freiborg did not answer, recognizing that Vilven liked to ''joke around'' and Freiborg hesitated to respond for fear of putting his foot in his mouth (Tr. 521). All that Freiborg responded was: ''What?'' Vilven again said: ''What kind of person are you . . . if you were in the desert [sic] dieing of thirst . . . and I gave you a glass of kool-aide, and if it were the wrong flavor, would you turn it down?'' (Tr. 521–522). Frieborg responded: ''What do you mean?'' (Tr. 522). Vilven said: ''How many times have we hired you back here?'' Freiborg answered: ''Once; I've been rehired once'' (Tr. 522). Vilven walked away. Frieborg never wore the union hat again and never had a similar conversation with Vilven again (Tr. 522).

Although Vilven testified as a witness for Respondent he did not respond to Freiborg's testimony. Rather, in Respondent's brief, it argues that Vilven's statements amounted to a ''noncoercive expression of opinion'' within the meaning of Board rules.

Discussion and Conclusions

Vilven's questioning of ''what kind of person'' Freiborg was, coupled with the reminder that a person seeking employment (''dieing [sic] of thirst'') should be grateful for a glass of Kool-Aide (Respondent's help) even if the Respondent's actions were not entirely viewed favorably by the person ''dieing [sic] of thirst'' [because Respondent's actions might constitute, in part, ''the wrong flavor,''] all of this constitutes Vilven's assertion that Freiborg should have been grateful to Respondent for rehiring him even if Freiborg did not agree entirely with Respondent's actions (''the wrong flavor'').

When Freiborg obviously did not immediately catch on to what Vilven was saying, Vilven decided to make it a bit more explicit: ''How many times have we hired you back here?'' This is the same thing as saying: ''How many times has the Respondent been kind to you (''kool-aide'') in giving you a job?'' This was a reminder that that which the Respondent has once given, Respondent might, in the future, take away if the circumstances permitted it. In short, Vilven was telling Freiborg that in the future, should the circumstance of rehiring arise, Respondent might not want to rehire Freiborg (''how many times have we hired you back here?'') Vilven's statement amounted to a threat not to rehire Freiborg in the future because of his identification (the union hat), as a union supporter, thus violating Section 8(a)(1) and (3) of the Act, as alleged. Since it also occurred in mid-June 1988, within a couple of weeks of the election, and after the filing of the petition, it constitutes objectionable conduct.

16. Alleged violation of Section 8(a)(1) and objectionable conduct; paragraph 5(q); Chuck Vilven allegedly threatens an employee with unspecified reprisals because of his support for the Union

A few days before the June 24 election,[42] Respondent conducted a ''captive audience'' meeting for its employees in the lunchroom after the afternoon break, featuring a speaker who negotiated on behalf of the Hormel Company in Austin, Minnesota. Employee David Engwal, a cook in the oven area, supervised by Randy Travers (Tr. 391) was seated at a table among 100 to 150 employees, waiting for the ''captive audience'' speech to begin. As employees were seeking seats at the tables in the lunchroom, Engwal turned to one of them and said: ''well is this another one of those scare meetings?'' (Tr. 401) The next thing he realized was Supervisor Chuck Vilven (supervisor of the deboning line) standing next to him, sticking his finger into Engwal's face (Tr. 401; 410) saying: ''Fellow we've been pretty good to you.'' Engwal replied: ''Chuck what you talking about?'' Vilven answered: ''Well you were hired for a night cook and you've been working days, and you've been treated pretty nice. Think of what you're saying.'' Engwal replied: ''Chuck I was never hired for night, I was hired for days, I don't know where you get that.''

Vilven then turned around, walked away, and then turned and shook his finger at Engwal saying: ''You better remember that.'' Vilven was red faced and appeared upset to Engwal.

Engwal worked from August 1987 until September 1988 when he voluntarily quit for another job. Beginning in August 1987, he had been part of the union organizing committee and got employees to sign union cards (Tr. 392).[43]

Viven testified that, as he was seeking a seat and passing Engwal who was already seated with half dozen employees, he heard Engwal say: ''You don't have to listen to this. It is just another scare tactic'' (Tr. 1037). Vilven stopped and, kneeling up against the table, said to Engwal: ''You've got it pretty good. I don't know why you are complaining'' (Tr. 1038). When Engwal asked him what he meant by that, Vilven said: ''I thought you were hired to be a night-shift cook and they were nice enough to leave you on days'' (Tr. 1038). Engwal answered: ''Well what do you mean by that? I wasn't hired to be a night cook.''

Vilven testified that he felt foolish because he might have had his facts mistaken so he walked away and that was the end of the conversation (Tr. 1038). Further, contrary to Engwal's testimony, Vilven testified that he was speaking in a normal voice level and was 3 feet away from him rather than the 8 to 10 inches that Engwal described with the addition to Vilven shaking his finger in Engwal's face. Given the noise level in the room at the time, Vilven estimated that only the half dozen employees sitting at Engwal's table would have heard him (Tr. 1039–1040).

[42] Apparently on June 20, 1988. See above, Supervisor Gale Rosen requesting employees to sit separately; par. 5(r) of the complaint.

[43] On cross-examination, Respondent, using Engwal's prior sworn statement attempted to show that Engwal manifested a bias in favor of the Union by referring therein to persons with whom he disagreed as ''scabs'' (Tr. 413). Not only did Engwal deny ever having used the word ''scab,'' but it was apparent that the prior statement contained the word ''scale'' or ''scales'' rather than ''scab'' (Tr. 413–417).

In addition, Vilven denied Engwal's testimony that he ran over to confront Engwal, shaking his finger in his face. Vilven denied sticking his finger in Engwal's face (Tr. 1040) because he was ''across the table from him'' (Tr. 1040). On the other hand, Vilven admitted that he ''might have pointed at him [with his finger]'' (Tr. 1040). Lastly, he denied telling Engwal, after the conclusion of the conversation: ''You remember that'' (Tr. 1041). Ultimately, Vilven testified that although he was kneeling about 3 feet away from Engwal, his hand was approximately a foot and a half from Engwal's face (Tr. 1042).

Discussion and Conclusions

While it is true that Engwal was a member of the union organizing committee and solicited signatures on cards, it is also true that he is no longer in Respondent's employ and has nothing to gain or lose from his testimony. Respondent's attempt to show him to be particularly anti-Respondent proved unavailing. Upon my observation of Engwal, I conclude that he was credible although I was not satisfied with his change of testimony as to the approach of Vilven, on the one hand saying that he saw Vilven running toward him from the end of the table and, on that other hand, saying that he saw Vilven standing next to him. Be that as it may, however, I was not satisfied with Vilven's testimony. As I reviewed the record and recalled my observation of Vilven as a witness, it appears to me that Vilven's conversation with Engwal, reminding him of how good Respondent was to him, was a repetition of a similar conversation with Freiborg (''how many times have we hired you back here?''). In the instant case, he is reminding Engwal that he was hired as a night cook and nevertheless permitted to work on the day shift, and ''you've been treated pretty nice, think of what you're saying'' (Tr. 401).

I agree with General Counsel's argument (G.C. Br. 67) that Vilven initiated conversations with employees about the Union regardless of their department; had done so with employee Freiborg several days previously and that Vilven was reminding employees of Respondent's past favorable actions with regard to employees. In the threat to Freiborg, above, I concluded that Vilven had stepped over the line of legality by essentially telling Freiborg that if the situation arose again and Freiborg desired to be rehired, Respondent would not rehire him because of his union activities, thus violating Section 8(a)(1) of the Act. In the instant case, Vilven did not make a similar statement: ''You've got it pretty good. I don't know why you're complaining'' (admitted by Vilven, Tr. 1038), but I concluded that he also jabbed his finger in Engwal's face and reminded Engwal that he had been hired to work nights and permitted to work days. In my judgment, the crucial question is what the meaning of the later expression was: ''Just you remember that.''

I conclude that although the tone, indeed the words, could be threatening, the statement is ambiguous. Based on Vilven's union animus, he is reminding Engwal of the favor that Respondent had done (notwithstanding that Vilven was mistaken) in permitting Engwal to work days, though hired as a night-shift employee. The Vilven statement: ''We've been nice to you, you'd better remember that'' (Tr. 401) would appear to be not a threat to Engwal; but only that Respondent had been good to him and therefore merited a less antagonistic position from Engwal who characterized the captive-audience speech as a scare tactic. I do not place Vilven's statement to Engwal as necessarily a threat to change his position or to retaliate against him in some other fashion. Thus, unlike the Freiborg situation, above, and while the matter is not free of doubt, I conclude that Vilven's statement here did not step over the line with regard to Engwal.

I shall therefore recommend to the Board that subparagraph 5(q) be dismissed on the ground that the alleged threat was not in violation of Section 8(a)(1) of the Act.

17. Alleged violation of Section 8(a)(1): paragraph 5(s); objectionable conduct: Chuck Vilven threatens employee Quarfort with retaliation because of his support of the union

Thomas Quarfort, employed by Respondent since 1977, works in the refrigeration and boiler department, supervised by Supervisor Jim Feldman. Quarfort, in October 1987, supported the Union by getting employees to sign membership cards as part of the union organizing committee (Tr. 439). In fact, he signed a union card on June 21, 1988, and gave it to Supervisor Feldman on June 22, 1988, the day after he signed it.

On June 23, 1988, the day after Quarfort gave Feldman the union card for his file, he wore a ''union hat'' to work. While Quarfort was picking up tools, with his union hat on, Supervisor Chuck Vilven came into the shop and was saying: ''Vote no, vote no'' (Tr. 448). Quarfort answered: ''I [am] going to vote yes'' (Tr. 447). By Vilven's facial expressions, Quarfort observed that Vilven became very angry (Tr. 448) and, as Quarfort was about to leave the shop, going through the door, Vilven came after him and, pointing at his nose, he said: ''Jim Feldman [has] carried [you] for 11 years'' (Tr. 448). He then added: ''You are lucky to have a job'' (Tr. 452).

On cross-examination, Quarfort admitted that he called Vilven a ''brown noser'' (Tr. 457) and also admitted that what Vilven actually said was: ''The reason that you're not going anywhere is that you don't do a damn thing around here and the only reason you have a job is because your boss has been carrying you for 11 years'' (Tr. 457–458).

It is undisputed that the conversation between Vilven and Quarfort rose to angry tones. (Tr. 458).

Discussion and Conclusions

I conclude that, as revealed on cross-examination, the actual conversation following the exchange wherein Vilven said ''vote no, vote no'' and Quarfort said ''I'm going to vote yes,'' was that Vilven said that the reason Quarfort was getting nowhere with Respondent is that he didn't do a damn thing and that the only reason he had a job was because Jim Feldman carried him for 11 years.

I conclude that this, again, is merely a forceful reminder by Vilven that Respondent had been good to an employee who ''did nothing,'' and had carried him for 11 years notwithstanding that the employee was going to vote in favor of the Union. I find no necessary implication in what Vilven said, in view of Quarfort's admission on cross-examination, that Respondent would cease ''carrying'' Quarfort in spite of his poor performance. Vilven, I conclude, was reminding Quarfort that Respondent was ''carrying him'' even though Quarfort said that he was going to vote in favor of the

Union. I conclude, on the basis of Quarfort's testimony itself, that General Counsel has failed to make out a prima facie case of a violation of Section 8(a)(1) of the Act. I therefore recommend that complaint paragraph 5(s) be dismissed.[44]

18. Alleged violations of Section 8(a)(1): Supervisor Chuck Vilven allegedly threatens an employee with termination and/or transfer in retaliation for her support of the Union; paragraph 5(v): paragraph 5(w); paragraph 5(bb); objectionable conduct

Connie Holm, a female employee in the white meat deboning area, worked under the supervision of Chuck Vilven. As I observed her while testifying, it was evident that she suffered from a speech and, in my judgment, a certain mental impairment. She nevertheless testified that she recalled the day of the election (General Counsel gave her the date as June 24, 1988). She testified that on that day, Supervisors Chuck Vilven and Jan Lueze spoke to her at the same time before the vote for the election. She testified, at first, that Vilven told her that if she didn't vote *for the Union*, she'd be fired (Tr. 465). Upon being shown her prior statement to ''refresh her recollection,'' she testified that Vilven told her that if she didn't ''vote no, she'd be fired and be moved to the dark belt'' (Tr. 466). She repeated, under my questioning, that Supervisor Vilven told her that if she didn't ''vote no,'' she'd be moved to the dark belt where they debone dark meat (Tr. 466). She also insisted that Vilven, at the same time, told her she would be fired. Indeed, she said that he said that she'd be fired at the same time that she would be moved into the dark belt (Tr. 466). She testified that although the voting occurred between 7:30 a.m. and 2 p.m., this conversation took place in the morning (Tr. 466). She also testified that Vilven said this in front of some friends of hers (Tr. 467). Holm was first employed on September 10, 1987, and ceased working for Respondent July 9, 1988.[45]

Later in the day, still on the day of the election, Holm testified that Vilven called her into his office (Tr. 469). He told her that she wasn't getting the meat out from under the wishbone in deboning the white meat and told her that she was looking at her boyfriend too much and missing too many days of work (Tr. 469–470). He told her that if she missed any more work she would be fired (Tr. 470).

On the Monday after the election, Holm said that Vilven told her: ''I told you so, I told you that you should vote no'' (Tr. 471) and that he knew that the Union wouldn't get in and he was happy because he got his bonus (Tr. 471). She further testified that she told him that she had voted yes and that the Union ''didn't make it in'' (Tr. 471). This latter conversation occurred before worktime on the Monday following the Friday election (Tr. 471).

In cross-examination, Holm admitted that while she had been working on the dark belt, she did so in the presence of her boyfriend; that Supervisor Jan Lueze told her that she was doing a real good job on the dark meat but looking at her boyfriend too much (Tr. 476–477). After becoming a white meat trimmer, her work caused her to face away from her boyfriend (Tr. 480). The transfer occurred around April 2, 1988 (Tr. 480).

In late May 1988, Holm had been absent from work for 2 weeks with pneumonia (Tr. 482) and met with Supervisors Jan Lueze and Chuck Vilven upon her return (Tr. 483). She provided a doctor's slip to them showing that she was capable of resuming work (Tr. 483). In that conversation, Supervisor Vilven said that she would not be fired as long as she was going to the doctor and was trying to take care of her problem. He said that Respondent would ''work with you'' (Tr. 484).

Supervisor Vilven testified that he initiated conversations about the Union with a number of employees both under his supevision and not under his supervision (Tr. 1083–1084). He denied that he had ''a number of conversations'' about the Union with her and recalled that the only ''direct conversations'' about the Union with Holm occurred in May (Tr. 1084). When he was asked about the content of the conversation, he testified he couldn't remember anything ''exactly'' about it. He recalled only the May 27 conversation referred to her ''missing time'' (Tr. 1084–1085). When again asked what was said about the Union in the conversation, he testified he didn't remember what the conversation was; and when asked specifically whether it was, indeed, about the Union, he testified, ''I believe so'' (Tr. 1085).

Jan Leuze did not testify in the proceeding.

Discussion and Conclusions

I distinguish between ''veracity'' and ''credibility.'' Veracity, I believe, concerns a conclusion as to whether a witness is telling or attempting to tell the truth, regardless of how flawed the witness' perception and recollection (''credibility'') may be. ''Credibility'' as I use it here, refers to a witness' powers of perception, recollection and the ability to articulate that which has occurred.

My observation, supported by the record, demonstrates that Connie Holm was a truthful witness; Vilven was untruthful. On the other hand, I agree with Respondent (R. Br. 31) that Holm had a ''serious inability'' to comprehend and relate to what she is hearing. Moreover, I agree with Respondent that the record shows that a significant part of her testimony was in response to General Counsel's leading questions. It is further true, that, in major respects, Holm's testimony was ''garbled'' and sometimes ''contradictory'' (R. Br. 31) in her accounts of what happened between her and Supervisor Vilven.

Experience, however, shows that a truthful witness does not become untruthful merely because the witness has trouble with dates, days, and even sequence of events, *Plumbers*

[44] Vilven's testimony essentially denies all of Quarfort's testimony (Tr. 1043–1050). Instead, he testified, credibly, that he told Quarfort: ''I don't know why you want the Union. You've got it made now'' (Tr. 1047). When Quarfort answered that he had gotten nowhere in the 11 years of employment, Vilven answered that if Quarfort would do something once in a while, he'd get somewhere. At this point, Vilven said Quarfort became angry and said that the only reason that Vilven had become a supervisor was because of his brown nosing (Tr. 1047). Vilven answered that he had put in a lot of extra hours in volunteer work to become a supervisor (Tr. 1048). Were a credibility resolution required, I would credit Vilven over Quarfort concerning the nature of the conversation and, on that additional ground, would recommend dismissal of the allegation.

[45] Holm was originally employed in the cutting of dark meat in the ''dark belt'' (Tr. 467). She was apparently transferred out of the dark belt to work on the deboning of white breast meat because she was spending time looking at her boyfriend (Tr. 469). The supervisor of the deboning department is Chuck Vilven; the assistant supervisor in the department where the white meat is scraped from the bone is Assistant Supervisor Jan Leuze (Tr. 462). Before the election, Holm had informed Supervisor Vilven that she hadn't like working in the dark belt (Tr. 468).

Local 195 (Stone & Webster Engineering Corp.), 240 NLRB 504, 514 (1979), enfd. 606 F.2d 320 (5th Cir. 1979).

I conclude that Holm truthfully recounted that on the day of the election she had a conversation with Supervisors Vilven and Leuze concerning the Union in which they told her to vote against the Union. In addition, I credit her testimony that on the day of the election, in that conversation, Vilven told her that if she did not vote against the Union, she would be fired or transferred back to the dark meat deboning job, a job which she had previously told Vilven she did not like. More than that I will not find. Vilven testified that he recalled a direct conversation about the Union with Holm in May (Tr. 1084). He then testified, with regard to that May conversation, that he believed that it included the subject of the Union (Tr. 1084). With regard to the content of the conversation, he testified he couldn't remember ''anything exactly about it.'' He referred only to the fact that it included a discussion of Holm's missing work (Tr. 1084–1085). In response to the direct question of whether he remembered what was said about the Union, he said he didn't recall what was said (Tr. 1085). When asked if he remembered whether it was about the Union at all, he testified: ''I believe so'' (Tr. 1085).

The record supports my observation of Vilven that he was continually retreating from a recollection that there was a discussion about the Union with Holm (he placed it in May); he then retreated to the position that he only ''believed'' that the subject matter included the ''Union.'' This is the testimony of a witness who does not want to discuss what he actually said to an employee about the Union; his memory seems to have been untroubled with regard to other matters.

My choice, therefore, is between an impaired employee with poor credibility, the subject of leading questions, but clear veracity, as opposed to a supervisor, propelled by union animus, with a propensity of talking about the Union to employees both under his control and foreign to his control, whose veracity is severely impaired but whose ability, especially in other areas, to perceive, recall, and articulate what has occurred was without substantial blemish.

Under these circumstances, I conclude, as alleged, that Vilven unlawfully threatened Holm with termination or transfer to a more onerous job if she did not vote against the Union (par. 5(v)). I am unable to conclude that the evidence is clear enough that he threatened her with discharge, as alleged in paragraph 5(w) if she missed any more days of work, in retaliation for her support of the Union. In addition, on the same ground, I shall recommend that the Board dismiss paragraph 5(bb) because the evidence is not clear enough that Vilven interrogated Holm on how she had voted in the union election on June 27, 1988 (Tr. 494), Vilven said to her: ''I told you so'' and said nothing further. Paragraph 5(bb) should be dismissed, therefore, as unproven.

19. Alleged violation of Section 8(a)(1): Respondent, by Supervisor Randy Travis, threatens an employee by grabbing union literature, tearing it up, and discarding it; paragraph 5(f); objectionable conduct

Employee David Engwal who, as above-noted, was employed by Respondent from July 1987 through September 12, 1988 (when he voluntarily quit) was a cook in the processing line. His immediate supervisor was Randy Travis, supervisor of the cryovac department (Tr. 394). Again, as above-noted, he was active in behalf of the Union during the organizing campaign, getting cards signed and as a member of the organizing committee.

Engwal testified that at the beginning of May 1988 (Tr. 393) he arrived at Respondent's facility about 5:30–5:45 a.m., to begin work about 6 a.m. (Tr. 393). He went to the lunchroom for coffee and saw that union handbills, distributed outside of Respondent's plant the night before, were lying on the table. He then sat at this table, reading one of the handbills, with coemployee Brad Wiggin sitting across the table from him. Engwal left the union handbill on the table and was in the process of walking to another table where there was a newspaper. As he was returning to his place across from employee Brad Wiggin (the step-son of David Engwal), Supervisor Travis came by, grabbed the union handbill, ripped it up, and threw it away. Engwal said to Travis: ''Randy, I thought this was a free country.'' Travis answered: ''Not in here it isn't.'' Engwal responded: ''Well, I guess you're right, its just like being in Russia'' (Tr. 393–394).

Engwal recalls that at the end of the conversation, Travis got ''real red in the face and turned around and walked away from me'' (Tr. 394). Engwal testified that there were 30 to 35 employees sitting at tables having coffee at the time. They looked at him, said nothing and looked at each other (Tr. 395). Engwal admitted that Travis spoke in a normal voice, as did he. The employees were between 6 and 25 feet from him at the time of the conversation.

At the time Travis picked up and destroyed the leaflet, there were newspapers, an Avon order catalogue, and other paper materials on the tables (Tr. 396).

Supervisor Travis was not called to testify at the hearing.

Discusssion and Conclusions

In the absence of any contradiction or limitation by any witness concerning this event, I credit Engwal's testimony.

General Counsel urges that a violation of the Act occurred because the ''discriminatory distruction of the union literature in the lunch room—and the vehemence with which it was ripped up'' (G.C. Br. 56) demonstrate that Respondent was threatening, restraining, and coercing Engwal's union activities in violation of Section 8(a)(1) of the Act: to possess and read union handbills in the break area on nonworktime, an adjunct to lawful solicitation, a protected Section 7 right.

I agree. Supervisor Travis was not picking up and destroying newspapers, catalogues, and other paper trash; he was interested in tearing up the union handbill in the immediate presence, in the face, of employee Engwal and other employees. Supervisor Travis was demonstrating for the benefit of employees an act of union animus. In so doing, however, he was not only not tearing up other materials, pointedly concentrating on the union handbill, but he was doing so in a nonwork area on nonworktime in the immediate presence of the employees.

He was teaching them a lesson.

The express or implied purpose of the handbill, of course, is to solicit support for and membership in the Union. Travis was demonstrating to Engwal that he would not permit this otherwise lawful solicitation to occur in the lunchroom during nonworktime notwithstanding that he would permit the reading of newspapers and other paper materials.

I therefore conclude that Travis' destruction of the union handbill in early May 1988, coercively interfering with lawful solicitation, violated Section 8(a)(1) of the Act as alleged in paragraph 5(f).

20. Alleged violation of Section 8(a)(1); Vice President John Jeffords destruction of union literature in the breakroom: paragraph 5(h); objectionable conduct

In addition to Engwal's testimony concerning Supervisor Travis' destruction of a union handbill, above, he also testified that he saw John Jeffords (vice president of production), known to Engwal only as someone ''out of the head office . . . something to do with production,'' (Tr. 398) in the lunchroom early in the morning before work started (Tr. 419).

He testified that prior to the commencement of union handbilling in April 1988, he didn't see much of Jeffords at this early hour in the lunchroom but he did see him occasionally (Tr. 419). On the days that the Union distributed handbills, however, Engwal testified that one could ''count on'' (Tr. 419) Jeffords being in the lunchroom early in the morning every day (Tr. 396, 419). At that time, according to Engwal, Jeffords would go around the tables and pick up the union handbills, rip them up, and throw them in the wastebasket. Some of the handbills he would place in his jacket pocket (Tr. 396). Jeffords allegedly continued in this conduct from April or May right up through the June 24 election (Tr. 397). Although there were various paper articles, such as magazines, newspapers, advertisements, and similar paper materials laying around on the tables, Engwal testified that Jeffords went around the tables and picked up only the union handbills for destruction and removal (Tr. 397–398). He never removed newspapers or magazines (Tr. 420). Engwal testified that the only supervisors who removed the union handbills were Travis and Jeffords.

Vice President John Jeffords, 19 years with Respondent, testified that the lunchroom has about 25 tables, each table capable of seating about 16 employees. He recalls that union literature appeared on the tables about seven times and he removed the literature three or four times (Tr. 990), each time at about 6:30 a.m. (Tr. 990). He denied that there were newspapers ordinarily lying around and he denied removing them (Tr. 991). If he saw that a newspaper did not belong to anybody, he would remove such newspaper (Tr. 991). He testified that he could tell that the newspaper did not belong to anyone because, if there was no one at the table, it didn't ''belong to anybody'' (Tr. 991). Similarly, he removed other paper materials and any litter that was on the tables (Tr. 997).

Jeffords testified that he is regularly at work at 6:30 a.m. and if he feels like going ''upstairs'' to the mezzanine lunchroom, he does so (Tr. 998) which was his practice both before and during the union campaign (Tr. 998).

Discussion and Conclusion

I credit Engwal's testimony that Jeffords removed only the union flyers and did not remove the newspapers. I also credit his testimony that he observed Jeffords present in the lunchroom in the morning on an irregular basis before the union handbilling started and regularly thereafter. Further, I credit Engwal that newspapers and other litter were left on the tables by Jeffords and that Jeffords selected only the union handbills. In passing, it must be noted that Jefford's actions did not occur at 6:30 as Jeffords testified but at or before 6 a.m. as Engwal testified. Engwal leaves the lunchroom to punch in for work at 6 a.m. Since he saw Jeffords perform this removal and destruction of the union handbills, it must have occurred before Engwal left the room to punch in at 6 a.m. and thus before the 6:30 a.m. mentioned by Jeffords in his testimony.[46]

As in the case, above, with Randy Travis, the evidence demonstrates that Jeffords' selection only of the union materials for removal and destruction from the lunchroom tables was an effort to prevent employees, in a nonwork area, presumably on nonworktime, from reading the materials and therefore was an interference with lawful union solicitation, among employees, seeking their own mutual support and perhaps aid for the Union. Neither Travis nor Jeffords was engaged in innocent trash removal by removing and destroying the union handbills. I have already credited Engwal's testimony that both Travis and Jeffords were selective in their removal: only the union handbills were removed and destroyed.

I conclude that, as alleged in paragraph 5(h), Vice President Jeffords violated Section 8(a)(1) of the Act in his selective interference with union solicitation by destroying the handbills on nonworktime in a nonwork area so that employees would not see the union handbills. By failing to destroy other catalogues, newspapers, and other modes of advertisement, he was permitting other forms of solicitation in the same lunchroom on nonworktime. Supervisor Travis' admission that the employees were not permitted to have the union handbill in the nonwork area on nonworktime, making it akin to ''Russia,'' explicitly communicated to them that this form of solicitation was not to be permitted and explicitly led Engwal to believe that he was not allowed to have such a notice in the area, *Mississippi Chemical Corp*., 280 NLRB 413, 419–420 (1986). Vice President Jeffords selective removal of only the union handbills, in the absence of any explanation to the employees who saw him do so, communicated to them that they were not allowed to have these notices in the area regardless of Respondent's acquiescence in the presence of other paper solicitation at the same time. *Mississippi Chemical Corp*., supra.

21. Alleged violations of Section 8(a)(1); Respondent, through Supervisor Schmitz, allegedly creates an impression that employee John Birch's union activities were under surveillance: paragraph 5(aa); objectionable conduct

As above-noted, employee John Birch had conversations with Assistant Supervisors Rick Noyes and Goff at the toolcrib. Thereafter, he was elected as an alternate to the union negotiating committee. This was in the evening, around the first of June 1988 (Tr. 590). On the next morning, at 6 a.m., the plant manager, Al Schmitz, approached employee Birch and said, ''I hear you're getting into politics too'' (Tr. 592). Birch's testimony constituted a retreat from

[46] It follows that Jeffords was in the lunchroom a full half-hour (or more) before he started work at 6 a.m. The argument may be made that Jeffords was in the lunchroom early enough to remove union leaflets and to prevent employees from reading them.

his prior testimony that Schmitz had said: ''I hear you're getting into politics last night'' (Tr. 590; 592). In any event, Birch answered, ''Yeah, I've always been a democrat'' (Tr. 590).

Schmitz did not testify on this point although called as Respondent's witness with regard to other matters.

Discussion and Conclusions

General Counsel argues that the only election that Birch participated in was his election to the union negotiating committee the night before. Thus, she argues, Schmitz' comment, made less than 10 hours after the election, clearly suggested surveillance (G.C. Br. 72). She urges that the 10-hour period between the election and the Schmitz' statement was not time enough for news of the election to circulate generally around the plant and that Schmitz wanted to convey to Birch that he had access to internal union information about Birch's union activities.

Respondent states that General Counsel's argument requesting an inference of ''impression of surveillance'' is ''a much too extravagent interpretation'' (R. Br. 24).

In support of this assertion, Respondent states:

> This record is replete with instances in which the employees are making little or no secret of their union activities and that the local newspaper was giving complete coverage to those activities. The city of Wilmar has a population of about 16,000. It was just as reasonable for Birch to conclude that Schmitz gained the information through idle gossip as by having a spy at the meeting. The statement creates no impression of surveillance.

The problem with Respondent's argument is that Schmitz did not testify on the point. Thus, Respondent and General Counsel both assume, correctly, that Schmitz was referring to ''union politics'' although all he said was ''politics.'' In addition, he did not testify that he had gained the information through some idle gossip in the plant or from the newspaper or from any other source. On this record, there is no source of information by which Schmitz, 10 hours after the 8:30 p.m. election, learned of Schmitz being ''in politics.'' As General Counsel points out, *Rood Industries*, 278 NLRB 160, 164 (1986), the Board's test for determining whether an employer created an impression of surveillance is ''whether employees would reasonably assume from the statement in question that their union activities had been placed under surveillance.'' What did Plant Manager Schmitz mean in telling Birch, 10 hours after Birch's election as an alternate to the Union's negotiating committee, that he ''heard'' that Birch was ''getting into politics?'' General Counsel and Respondent assume that Schmitz implied, and Birch understood, ''politics'' to mean ''union politics.'' I agree. In the absence of other explanation, I must necessarily conclude, under the Board's rule, that Birch could ''reasonably assume'' that Schmitz knew about Birch's election as alternate member of the union negotiating committee.

Respondent's argument that other employees made no secret of their union activities does not suggest that a meeting, composed solely of union members, was an occasion whereby the employees were making little or no secret of that union meeting. Furthermore, there is no showing that the local newspaper mentioned this, much less that it mentioned this 10 hours after the event. Nor did Schmitz or any other supervisor testify that they had learned of Birch's being elected as a negotiating committee alternate by some other means. It was therefore, contrary to Respondent's argument, *not* as reasonable for Birch to conclude that Schmitz gained the information through idle gossip as by having a spy at the meeting. Moreover, there is no reason, on this record, why Schmitz would make a gratuitous reference to Birch engaging in ''politics'' if he was not referring to union politics and if he was not referring to the election. Schmitz should have supplied the source of his information.

I conclude that, as alleged in paragraph 5(aa), in or about the beginning of June 1988, Respondent, through its supervisor, Plant Manager Allen Schmitz, created an impression that employee John Birch's union activities were under Respondent's surveillance.

The Remedy

While the timing of Vice President Jeffords' ''no instructing'' rule, directed solely at the quality control department, the source of union organizing, demonstrates that it was in response to the advent of union handbilling and organizing, there is no allegation relating to the unlawfulness of the October 1987 ''promulgation'' of the rule. The rule was designed to interfere with prounion solicitation. The implementation, however, of the expanded rule was a different matter. The October ''no-instructing'' rule existed through April 1988 when Bembers was placed in de facto charge of the quality control department employees. With his advent, the rule was transmuted (by Bembers) into a generalized ''no-talking'' rule again solely for quality control employees who were known or suspected of soliciting for the Union among production employees. The ambiguity of implementation, however, can be seen in the fact that Respondent was no longer maintaining the fiction of having a ''no-instructing rule'' (to prevent quality control employees from bypassing line supervisors and dealing directly with line employees' errors); for it was applied against quality control employees who were not talking to production line employees but merely speaking with each other; and then it further became a ''no-talking'' rule even on breaktime in the nonwork area of the lunchroom when Supervisor Rosen attempted to physically separate prounion quality control employees. I have concluded, above, that, commencing with the period 6 months prior to filing of the charge in Case 18–CA–15035 on June 20, 1988, the implementation of this successively more severe ''no-instructing'' rule constituted a violation of Section 8(a)(1).

Similarly, production employees were witnesses to issuance of unlawful verbal warnings for, violations of the above unlawful antiunion, no-solicitation rule to the three union advocates (Sander, Farkas, and Noyes) in the quality control department. Thus line employee David Engwal was directly involved in the Farkas warning of June 8. Similarly, employee Wiggin was involved in the unlawful warning to Noyes issued by the plant manager on June 15. In short, although there were only eight employees in the quality control department who were made subject to an unlawful ''no-talking'' rule and only three, the actual objects of the rule, were issued disciplinary warnings thereunder, in violation of Section 8(a)(1) and (3) of the Act, it is clear that production

line employees were exposed to and coerced by the unlawful implementation of this discriminatory rule in their working relationships with the quality control employees.

Outside of the quality control department, I have found that Supervisor Dave Lyon told employee Kevin Shaw that Respondent would never agree to what the Union was seeking in negotiations, would close down the plant and hire new employees. He uttered these remarks in the presence of one or two other employees (Tr. 554). I have found that Supervisor Leuze unlawfully suggested to employees Vicky Christenson that she find a job at a union plant since the Union was not getting in. There were other employees seated at Christenson's table in the break area when Leuze made these remarks. When Supervisor Randy Travis unlawfully destroyed union literature in the breakroom, in the presence of 30 or more employees, I have found such conduct violated Section 8(a)(1) of the Act (Tr. 393–395). Similarly, Vice President Jeffords unlawfully destroyed union literature, neglecting other printed materials at the same time, in the presence of employees. I have found that Supervisor Les Goff, in violation of Section 8(a)(1), told employee Kevin Shaw and employee Terry Ostlund that in the event of a union victory, the Respondent would close down and that there were plenty of Mexicans in Wilmar to fill the shoes of the existing employees. There were perhaps five or six other employees nearby at the time the remarks were made.

Supervisor Vilven unlawfully threatened employee Freiborg with the possibility of not rehiring him in case that condition ever arose because of Freiborg's support of the Union.

Lastly, Supervisor Vilven threatened employee Connie Holm with discharge because of her support of the Union.

All of the above unlawful violations of the Act, also alleged as objections to the election, occurred during the *Ideal Electric* critical period, i.e., between the date of the filing of the petition in Case 18–RC–14327 (April 14, 1988) and the date of the Board-conducted election (June 24, 1988). These unfair labor practices, in this consolidated case, may be considered, therefore, for the purpose of setting aside the election.

While it is true that many of the unfair labor practices were committed by production line supervisors, or assistant supervisors, yet persons from higher management were also involved. I have concluded that the vice president of production, John Jeffords, violated Section 8(a)(1) of the Act by his necessarily ostentatious (his mere presence, also, focuses attention on his actions) destruction of union handbills in the break area on breaktime, committed in the presence of employees. This was a more methodical repetition of the emotional destruction of a single leaflet by Supervisor Randy Travis in the presence of employees in the same place. Plant Manager Schmitz also participated in unfair labor practices in curbing the worktime solicitation of quality control department employees on behalf of the Union under a discriminatory unlawfully disparately enforced rule. He worked, in this regard, together with another corporate official, Dr. Martin Bembers, whom Respondent placed in full charge of the quality control department, apparently a hotbed of union activists, superseding the nominal supervisor in that department, Gale Rosen. Assistant Plant Manager Nelson was also involved in unfair labor practices. Thus it cannot be said that higher management was not involved in the unfair labor practices.

The nature of the unfair labor practice is also a full spectrum of interference, restraint, and coercion. The violations of Section 8(a)(1) run from threats to close down, threats of discharge, threats not to rehire, and similar ''hallmark'' types of verbal violations. See *NLRB v. Jamaica Towing*, 632 F.2d 208 (2d Cir. 1980); *Regency Manor Nursing Home*, 275 NLRB 1261, 1262 (concurring opinion) (1985). In this regard, it is to be recalled that we are here dealing with the problem of whether a Board-conducted election should be set aside rather than whether a *Gissel Packing Co*., 395 U.S. 575 (1969), bargaining order should issue. Thus we are not dealing with the problem of whether the unfair labor practices are so pervasive or outrageous that the cumulative effects of this misconduct prevent a fair election from being held. *Gissel Packing Co*., supra at 614. Rather, since the unfair labor practices were attributed to Respondent through the agency of its supervisors, and since we are dealing merely with the question of setting aside the election for the purpose of holding a rerun election, the Board standard is whether the Respondent's conduct merely destroyed the ''laboratory conditions'' necessary for a free and open election, *M & M Supermarkets v. NLRB*, 818 F.2d 1567 (11th Cir. 1987); *Standard Products Co*., 281 NLRB 141 (1986).

In determining whether the ''laboratory conditions'' of a Board-conducted election have been compromised, necessarily causing the Board to direct a second election, the rule is that conduct violative of Section 8(a)(1), as opposed to mere objectionable conduct, is a fortiori, conduct which interferes with the election result. A second election is directed unless the unlawful conduct is so de minimis as to make it virtually impossible to conclude that the violations could have affected the results of the election. In determining whether the conduct is de minimis, the Board takes into consideration (1) the number of violations, (2) their severity, (3) the extent of dissemination, (4) the size of the unit, and (5) other relevant factors. *Eskaton Sunrise Community*, 279 NLRB 68 (1986). See also *NLRB v. Mercy-Memorial Hospital Corp*., 836 F.2d 1022 (6th Cir. 1988); *Caron International*, 246 NLRB 1120, 1122 (1979). Again, we are not dealing with a *Gissel* bargaining order which ordinarily requires ''hallmark'' violations. We are dealing with only unfair labor practices which, a fortiori interfere with the conduct of an election. The test ''of conduct which may interfere with the laboratory conditions'' for an election is considerably more restrictive than the test of conduct which amounts to interference, restraint, or coercion which violates Section 8(a)(1). *Dal-Tex Optical Co*., 137 NLRB 1782, 1786–1787 (1962).

On the other hand, the tally of ballots (G.C. Exh. 1(k)) shows that, in the June 24, 1988 election, there were 539 eligible voters in Respondent's Wilmar plant. Of the 514 valid votes cast and counted, 301 employees voted against the Union; 213 voted in favor of the Union. Thus it is clear that the Charging Party failed of success by a substantial margin. Whether this can be attributed to Respondent's unfair labor practices depends on whether the nature of the unfair labor practices, and their dissemination, permits the inference that there may well have been ''substantial interference'' with the election. *Caron International*, supra; or, whether, in view of the size and disparity in the vote, the unfair labor practices,

even considering their nature, number, and disseminiation, were de minimis.

In view of the number of unfair labor practices found, their nature (threats, warnings, literature, destruction, etc.) the implication of certain high-ranking supervisors who committed the unfair labor practices, and their dissemination to at least several dozen employees, I cannot conclude that the effect of these unfair labor practices was de minimis. I conclude, therefore, that Respondent's unlawful conduct, in the *Ideal Electric Co*., 134 NLRB 1275 (1961) period, may well have substantially interfered with the election. I further conclude that since the standard for interference necessary to set aside a Board-conducted election is substantial interference with ''laboratory conditions,'' *Dal-Tex Optical Co*., supra at 1786–1787, I recommend to the Board that the election in Case 18–RC–14327 be set aside, and that the Regional Director for Region 18, direct the holding of a second election at such time as the Regional Director for Region 18 deems appropriate. In view of this disposition, it is unnecessary to decide whether the Joint Petitioners' separate objection to the election has merit.

Other than the above, having found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, I recommend that Respondent be ordered to cease and desist therefrom and from like and related conduct and that it be ordered to take certain affirmative action necessary to effectuate the policies of the Act.

There are no allegations of unlawful discharge in the case. There is, however, an unlawful suspension in violation of Section 8(a)(1) and (3) of the Act, which requires remedy. I recommend that the employee, Susan Sander, be made whole with interest, for any losses she sustained by virtue of the unlawful suspension and that the memorialization thereof, together with the memorialization of any unlawful ''verbal'' or written warnings, as found herein, be expunged from her record an from the personnel records of any of the employees against whom such unlawful warnings were issued. *Sterling Sugars*, 261 NLRB 472 (1982).

Backpay will be computed on a quarterly basis as set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest thereon to be computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[47]

ORDER

Respondent, Jennie-O Foods, Inc., Wilmar, Minnesota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Suspending, disparately disciplining, imposing stricter discipline on, issuing warnings to, or segregating its employees because of their activities evincing sympathy for, membership in, or activities on behalf of United Food and Commercial Workers, Local 653, AFL–CIO, CLC, and General Drivers, Helpers, and Inside Employees, Local 487, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the Union or Unions), or either of them, or any other labor organization, or because such employees engage in concerted activities protected by Section 7 of the Act.

(b) Threatening to discharge, not to rehire, to transfer to other jobs, to close the plant, to not bargain with the union, or any other retaliation or reprisal against its employees because they support the Union, or either of them, or any other labor organization, or because they engage in concerted activities protected by Section 7 of the Act.

(c) Preventing the display and use of union insignia in the nonwork areas in the plant in the absence of such device's interfering with production, safety, discipline, or health requirements.

(d) Attempting to segregate employees, challenging employees to fight, calling employees ''traitor,'' destroying union literature, or creating the impression of surveillance of its employees' union activities.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole Susan Sander for any loss of earnings she may have suffered by virtue of her being unlawfully suspended on August 5, 1988, backpay to be computed on a quarterly basis, with interest thereon, in accordance with the rules set forth in the above remedy section.

(b) Remove from Respondent's personnel records any warnings, both verbal and written, issued to Susan Sander, Tina Noyes, and Sarah Farkas in the period April through August 1988, for violation of Respondent's ''no instruction'' rule or ''no talking'' rule and notify each of them, in writing, that this has been done, and that evidence thereof will not be used as a basis for any future disciplinary action.

(c) Preserve and, on request, make available to the Board or its agents and for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Plant Number 4, Wilmar, Minnesota place of business copies of the attached notice marked ''Appendix.''[48] Copies of the notice on forms provided by the Regional Director for Region 18, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

IT IS FURTHER ORDERED that the election of June 24, 1988, in Case 18–RC–14327 be set aside, and that case is severed and remanded to the Regional Director for Region 18, to conduct a second election whenever he deems it appropriate.

[47] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[48] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''